No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, C. C. CLARK, L. P. FORETELL, A. F. BUSHNELL, JOHN DOLAN, PAT LEROUS, J. T. FITZGERALD AND ELIZABETH BROWN,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE.

JOHN A. SHELTON,
Solicitor for Appellee.

MC KEE PRINTING CO., BUTTE.

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BRIEF OF APPELLEE.

Statement of the Case.

This suit was brought by the appellee, as complainant, to determine an adverse claim to certain real property situated in Silver Bow County, Montana. The allegations of the bill necessary to be noticed here are, that by virtue of a United States patent and mesne conveyances from the patentees therein named, it is the owner in fee simple absolute of certain particularly described property, the same being a portion of the Butte and Boston placer mining claim, Survey No. 3379; that the defendants claim an estate or interest in

such land, which claims are without right and are invalid (T. 1-4).

The defendants by an answer denied such allegation of ownership on the part of the complainant (T. 5-6) and by cross-bill affirmatively alleged that on the 11th day of May, 1891, Simeon V. Kemper and Josephine Lorenz made entry in the United States Land Office, at Helena, Montana, of a certain placer mining claim designated as Survey No. 3379; that on December 19, 1895, a patent therefor was issued to them, which patent excepted any vein or lode of quartz or other rock in place bearing gold, silver, cinnibar, lead, tin, copper or other valuable deposits known to exist within the land described in the patent on the 11th day of May, 1891; that at the date of the application for such patent certain lodes, veins or deposits of mineral ore or rock in place carrying copper, silver, lead and other valuable minerals or metals were known to exist within the boundaries of such land; that the existence of such veins was, or should have been by the exercise of reasonable diligence, known to the applicants for such patent at the date of such application and that the public generally at such time knew of the existence of such veins; that the application for such patent did not include an application for any lode or vein so known to exist, and that by reason thereof such lodes and veins were excluded from and excepted out of such patent and remained unappropriated public mineral lands of the United States; that thereafter Samuel Kift and

Isaac Knoyle made a location on one of such veins of the Hornet Quartz Lode Mining Claim and R. O. Merriman made location on such veins of the Rabbit, Hope, Olivia, and Gulf Quartz Lode Mining Claims, which locations were made respectively on the 19th day of March, 8th, 15th, 16th and 19th days of May, 1900; that "the aforesaid veins lie in large part within the premises mentioned and described in the alleged bill herein and said lode claims embrace nearly all of said ground"; that the defendants, prior to the commencement of the action, by due and legal conveyance became and were at the time of the commencement of the action the owners of such lode claims; and that the complainant asserts some right or title in or to the same which claim is invalid (T. 7-14).

Such allegations of ownership in the cross-bill of the defendants is denied by the complainant in its answer to the same (T. 15-24) and to the defendants' answer the complainant filed the general replication (T. 25).

Upon the issues so framed testimony was taken. Upon such testimony and the pleadings the case was heard, Judge Frank S. Dietrich sitting, who after hearing the arguments in the case personally examined the openings and prospect holes on the ground in controversy, and part of such other openings and prospect holes as were referred to in the testimony and thereafter a written opinion was filed (T. 31-48) and a decree entered in favor of the complainant (T. 29-31) from which decree the defendants have appealed.

BRIEF OF ARGUMENT.

The Evidence.

The assignment of errors filed (T. 50-52) indicates that appellants rely upon two points for the reversal of such decree, the first of which is that on account of certain alleged quartz lode locations claimed by the appellants to have been made by third parties prior to the date of the placer location upon which Simeon V. Kemper and Josephine Lorez based their application for patent, some indefinite portion of the land covered by said application was withdrawn from entry and was not subject to disposal or sale by the government at the time such patent issued, and in consequence thereof, appellants claim that such patent so far as it embraced ground covered by such alleged lode locations (the exact amount of which is not indicated) was invalid.

The second point is that all of the ground embraced within the five lode locations referred to in the cross-bill, namely, Hornet, Rabbit, Hope, Olivia and Gulf lodes was according to appellants' contention excepted from such patent and did not pass to the patentees therein named but remained subject to location because of the existence within such lode claims of lodes or veins, the existence of such veins or lodes being known to such applicants for patent at the date of such application.

It will only be necessary to consider so much of the

evidence as was directed to the issues made by the pleadings which we have heretofore stated.

Such evidence in chief, on the part of the complainant, consisted of proof of the location of the Butte and Boston placer, the issuance of patent, conveyance from the patentees named in such patent to the complainant and oral proof showing the boundaries of the ground in controversy. (T. 57-58; 67-68).

As to the evidence offered by the defendants to overcome the prima facia case so made, the contentions of the appellee are, (first) that such evidence is wholly insufficient, if taken as true and if it stood entirely uncontradicted, either to entitle the appellants to any affirmative relief or to defeat the title of the complainant, but if not (second) that it is entirely insufficient for such purposes under the strict rule of proof which is to be enforced in cases of this kind, such rule requiring that such proof be clear and convincing, and (third) that as to all points as to which there is a conflict in the evidence the weight of the evidence is entirely in favor of the complainant.

A brief statement of the situation and outline of the events which led up to the commencement of this suit will help to a clear understanding of the discussion of the evidence which is to follow.

The "Butte Hill" on which is situated all of the important quartz mines in the Butte district developed prior to and in operation on May 11, 1891, is bounded on the easterly and southerly sides by a district of much

lower elevation commonly referred to as "the flat", through which flows Silver Bow Creek. The land embraced in the Butte and Boston placer (a patented placer mining claim) is a portion of such low-land lying adjacent to and easterly from said Silver Bow Creek. About a mile east of the eastern boundary of the Butte and Boston placer is the summit of the main ridge of the Rocky Mountains with an elevation much higher than the land embraced in such Butte and Boston placer. On the slopes of the hills or mountains extending down to the flat on each of its two sides the solid formation comes to the surface and is without any covering of soil or loose earth or rock. Therefore any veins which occur there may be traced by the outcrop on the surface. The loose rock and earth carried down by the process of erosion from such mountain sides has partially filled and given a comparatively level surface to the depression between referred to as "the flat," and there the solid formation instead of coming to the surface is at varying depths below the surface and any veins existing are not exposed naturally on the surface. The deposit which there overlays the solid formation is shallow at the foot of the mountain side but increases in depth as the middle of the flat is approached where it has a depth exceeding 600 feet. Whatever veins exist in the flat, of course, are unknown except such as may have been discovered by under-ground workings.

On December 20th, 1890, a location was made of the

Butte and Boston placer claim and on May 11, 1891, the locators made application for patent. All of the ground designated as the flat had been either prior to that time or was subsequently patented as placer ground with the exception of one or two agricultural entries. A great deal of the flat along Silver Bow Creek had been worked for the placer gold which it contained and in at least one place on such flat a deposit of clay acquired under placer location had been utilized for making brick. The nearest developed quartz mine to the Butte and Boston placer was distant about one and one-half miles and was on the edge of the Butte Hill and on the westerly side of Silver Bow Creek. Any veins which could then be traced by out-crop on the Butte Hill did not run in the direction of the Butte and Boston placer and so far as appears from the evidence there was no underground development which in any way pointed to the existence of any such veins in that ground. The bed-rock exposed on the mountain side to the east of the Butte and Boston placer does not show any veins running in the direction of such placer claim nor have any such been discovered there by underground development.

Some time during the summer of 1891 certain prospect holes were sunk by the defendant Mason who was then doing representation work on two attempted lode locations claimed to have been located April 1, 1890, and called Point Pleasant and Pleasant View. A portion of such holes were probably sunk before May 1st, of

that year. Mr. Mason claims that a portion of them were sunk to bed-rock, which statement, however, is contradicted by the witness Kemper for the complainant. All of them, however, were outside of the ground in controversy in this case and in the easterly portion of such placer claim. The Pleasant View discovery was within the ground in controversy in this case, but defendants practically concede that no vein was exposed there. The Point Pleasant discovery was entirely outside of the Butte and Boston placer.

Such application for patent was adversed by the defendant, Louis Mason, and others who claimed to be the owners of the Point Pleasant and Pleasant View claims covering a portion of the same ground, and they then began two suits in the District Court of Silver Bow County, Montana, to determine the rights of possession as to the land covered by such alleged lode locations. Prior to the time such cases came on for trial in the District Court, Patrick Mullins who testified on behalf of the complainant in this case became a part owner in such alleged lode locations. According to his testimony from his examination of the ground he became convinced that such alleged locations were invalid for the reason that they had no discovery of any vein upon which to base such location and the owners of the lode claims then decided to secure a compromise, if possible. Afterward such cases were compromised by which compromise judgments were rendered in favor of the placer appli-

cants, who were allowed to procure patent under an agreement to deed to the lode claimants the easterly one-third of the ground embraced in such placer location. The placer applicants did obtain patent on December 19th, 1895, and thereupon deeded to the lode claimants the easterly one-third of the ground embraced in such patent in accordance with the compromise agreement. With the exception of some work done in shaft designated as 9, on defendants' exhibit No. 1 in which shaft it is quite clear from defendants' testimony there was no vein disclosed, prior to the date of the placer application, there was no further work done in an attempt to develop any lead supposed to exist in the ground until the year 1900, although it appears from the testimony, the defendant Mason had a lease on the easterly portion of the ground and had an opportunity to do such work had he thought that it would have been profitable.

On March 19, 1900, Samuel Kift and Isaac Knoyle located the Hornet claim, the discovery shaft on which claim is in a prospect hole which according to the testimony of defendant Mason had been made prior to May 11th, 1891. It appears, however, from the declaratory statement of such location that the vein claimed to have been discovered was in a cross-cut running to the southwest, and whatever was disclosed in such cross-cut it is not claimed was exposed prior to May 11th, 1891. After the posting of the notice of location of such claim, but before the completion of the

location, the defendant Mason and his brother-in-law, defendants' witness Merriman, took a lease and bond on such claim and another attempted location over it was made in the name of Merriman which was called the Gulf. The discovery hole on that claim was about 15 feet north of the Hornet discovery. In sinking such hole a small north and south fault was encountered in the Gulf discovery. When such fault was encountered it was followed, a cross-cut being run north about 15 feet where an east and west vein was discovered, the same being about thirty feet north of the Hornet discovery shaft. No further work was then done through the Gulf discovery but a tunnel was started, work being begun on such tunnel a short distance to the west and driven in such a direction as to encounter about 30 feet north of the Hornet discovery, the vein which had been discovered, and the defendant Mason and his partner Merriman then began the work of extracting the ore found in such vein through such tunnel. Suit was then begun by the owners of the placer title covering that ground to enjoin such work and it was not until after the commencement of such suit that any connection was made between the Gulf discovery and the Hornet discovery when an effort was made on the part of Mason and Merriman to hold the ground and for that purpose to show that such vein discovered in 1900 extended so far south as to be disclosed in the prospect hole which they claimed had been made prior to May 11, 1891, and which they claimed had been again dug out to make the Hornet discovery.

Evidently encouraged by the discovery of the vein which is disclosed in the tunnel referred to, attempted locations were made of three additional claims in such a way as to cover practically the whole of the Butte and Boston placer. As bed-rock was nearest the surface on the extreme eastern portion of such placer claim, it was only in that portion that any attempt was made to claim discoveries and as the placer claim was much wider on its western side it was necessary in order to cover it in that way to spread out such claims at their western extremity. One of the claims was given a northwesterly and southeasterly course and another a southeasterly and northwesterly course, and it was considered necessary to make the five locations, although the claim of the defendants here is that only two veins were discovered and that such veins have an easterly and westerly course.

On account of such locations the complainant being the owner of the westerly two-thirds of the Butte and Boston placer brought this suit.

All evidence of the existence of veins, whether discovered before or after the date of the placer application so far as the same is based upon actual exploration is with the exception of the Pleasant View discovery confined entirely to the easterly portion of the Butte and Boston placer and outside of the ground in controversy in this case, except that the defendants claim

an exposure of such veins in shafts 19 and 21 (Defendants' Exhibit No. 1) which shafts are barely within the ground in controversy. Taking the Butte and Boston placer as a whole and including that part of it which is outside of the ground in controversy in this case, the defendants have produced no evidence which will warrant the conclusion that there was a discovery of any vein there on or prior to the date of the placer application. Such evidence is also wholly insufficient to show any valid existing lode location on any part of the Butte and Boston placer at the date of the placer application or at the date of the issuance of patent.

The testimony may be classified in a general way as relating to five different questions as follows:

FIRST: WAS ANY LODE OR VEIN KNOWN TO EXIST WITHIN THE LIMITS OF BUTTE AND BOSTON PLACER AT ANY TIME ON OR PRIOR TO THE DATE OF THE PLACER APPLICATION?

SECOND: WAS ANY SUCH LODE OR VEIN KNOWN TO EXIST ON OR PRIOR TO THE DATE OF THE PLACER APPLICATION WITHIN THAT PORTION OF THE BUTTE AND BOSTON PLACER WHICH IS INVOLVED IN THE CONTROVERSY IN THIS CASE?

THIRD: IS THERE ANY COMPETENT PROOF OF THE EXISTENCE OF ANY VEIN

OR LODE WITHIN THE GROUND IN CONTROVERSY IN THIS CASE?

FOURTH: IS THERE EVIDENCE DEFINING ANY VEIN SUPPOSED TO EXIST IN THE GROUND IN CONTROVERSY IN THIS CASE SUFFICIENT TO PERMIT THE DRAWING OF A DECREE GIVING SUCH VEIN WITH AN AREA OF ENCLOSING SURFACE GROUND TO THE DEFENDANTS?

FIFTH: IS THERE ANY COMPETENT PROOF OF THE EXISTENCE OF ANY VALID LODE LOCATION COVERING ANY PORTION OF THE GROUND IN CONTROVERSY IN THIS CASE AT THE DATE OF THE PLACER APPLICATION OR AT THE DATE OF THE ISSUANCE OF PATENT FOR THE BUTTE AND BOSTON PLACER?

FIRST.

No vein could have been exposed on the surface of the Butte and Boston placer for the reason that the entire surface of such claim is composed of wash or soil. We do not understand that the defendants make any other contention. The only intimation in the testimony to the contrary is contained in the statement made by the defendant Mason, who testified on behalf of the defendants, which statement is to the effect that on the extreme eastern portion of the Butte and Boston placer there is an appearance of rock on the sur-

face which may or may not be bed-rock (T. 98). There was no statement by this witness, however, that the portion of the bed-rock so exposed showed the existence of any vein. There is direct testimony on the part of several other witnesses to the effect that there is no exposure of bed-rock within the limits of such claim. As there was at the date of the placer application no under-ground exploration in adjacent property there could be no discovery of any vein within the limits of such placer claim except by openings on the surface. There were certain prospect holes sunk on the western portion of the Butte and Boston placer prior to such date, which prospect holes were made by the placer locators. It is not claimed that any vein was disclosed in any of them. In fact the evidence is uncontradicted that none of such holes reached bed-rock. There is only evidence of five prospect holes as to which there is any evidence in any way indicating the disclosure within the Butte and Boston placer of a vein at or prior to May 11, 1891, the date of the placer application. These are the so-called Pleasant View and Hornet discoveries and shafts 1, 2 and 9 as indicated on the map, Defendants' Exhibit No. 1. Defendants claim a vein was disclosed in the so-called Point Pleasant discovery which was, however, as already stated outside of the Butte and Boston placer. If there had been any discovery of a vein in the Hornet discovery, such discovery could not have been earlier than the 1st day of May, 1891, since

it was about that time that the defendant Mason claims he began sinking such shaft. The evidence as to the date that the shaft was sunk is of such character that a serious doubt may be entertained as to its having been sunk prior to May 11, 1891. The only evidence intimating the possible existence of a vein in the Pleasant View discovery was given by defendant Mason. The substance of his statement, however, is that he had first thought that there was a vein disclosed there, but that he afterwards discovered that he had been mistaken and that what he thought was a vein was merely an occurrence of green-stained rock in the surface wash, the prospect hole in question not having been sunk sufficiently deep to encounter bed-rock (T. 97-100). Testimony given by him upon a former trial was produced and by him admitted to be correct, which former testimony admitted such mistake as to the existence of a vein (T. 99-100). The location of the Point Pleasant discovery was not proved by competent evidence. Mr. Mason testified that he was told by a Mr. Passmore that a certain prospect hole was the Point Pleasant discovery. When it was developed that his statement as to the location of such prospect hole was based upon hearsay, complainant's counsel moved to strike out such testimony upon the ground that it was incompetent (T. 96). His testimony, however, furnishes no competent proof of the discovery of a vein at the place which he considered the Point Pleasant discovery. Concerning this matter his testimony is: "Where the notice was

posted in this cut the rock was all of a green cast, green ore stained with copper and I should judge it to run 5 per cent. In the discovery on the Point Pleasant the operator got to bed-rock" (T. 72-73). This we submit does not amount to a statement that the green ore or rock of a green cast was in bed-rock. The statement is that where the notice was posted in the cut the rock was of the character described. Such rock, however, might have been encountered in the surface wash but not in bed-rock. It may be possible that the witness meant to say that such green-stained rock was encountered in bed-rock, but he fails to make such statement definitely. The only statement which he did make is as to the occurrence of green-stained rock and ore which occurrence may have been in the surface wash.

Mr. Mason testified that in the latter part of April, 1891, shaft 9 had been sunk by him to a depth of 10 feet. Later and subsequent to 1895 and subsequent also to the compromise which resulted in the giving of a deed to the quartz claimants of the east one-third of the Butte and Boston placer, he obtained a lease on such land and did certain development work, all of which was confined to shaft 9 except that a cross-cut was then run north from it. Such samples as were produced from that shaft and connected workings were not taken from any part of it which was opened prior to May 11, 1891. They were in fact practically all taken from the cross-cut running north from such shaft where not earlier than 1895 a small vein or certain

stringers were discovered. Defendants' Exhibits Nos. 7, 33 and 85 were all taken from the north cross-cut from such shaft (T. 97, 159, 711). The opening made at that place of the extent which Mr. Mason testifies that it was made prior to May 11, 1891, was not sufficient to show the existence of anything which might be called a vein. Mr. Mason's testimony contains the statement that the shaft was sunk in vein material, Defendants' Exhibit No. 100 he said came from the outside of the shaft and some distance from the walls of the shaft, Defendants' Exhibit No. 109 he claims was taken from the bottom of the shaft in 1895 or 1896 and thrown on the dump near the shaft where it lay until it was obtained by him in December, 1911, and produced in evidence (T. 993). No effort was made to produce any samples actually exposed within the walls of the shaft within 10 feet of the surface and no question was asked by counsel for the defendants calling for any statement as to the character of the material which composed such walls. The complainant, however, caused the lagging to be removed from the east side of the shaft and Mr. Barker, a witness for the defendants, in response to a question asked by complainant's counsel stated that no vein was exposed there (T. 787). If any vein had existed there, it would have been exposed in such wall since the supposed course of the veins are easterly and westerly. H. J. Mason, a witness for the defendants, stated that he saw the opening made by this pros-

pect hole when it was sunk in 1891 and that no vein whatever was disclosed there (T. 190). Complainant's witnesses testified as to the existence of certain small veins and stringers in the cross-cut north from shaft 9. Their dip was such, however, that they would not be encountered in sinking the shaft (T. 1113). All of the witnesses called for the complainant testified as to the absence of any vein in that shaft. The failure on the part of the counsel for defendants to question witnesses called on their behalf as to the character of material exposed in that portion of the shaft which was sunk prior to the date of the placer application or to show the character of the material found there amounts to an admission that no vein was so exposed. Whatever weight, under the circumstances, is to be attached to the statement of the defendant Mason as to the existence of vein material, is entirely overcome by contradictory statements made by H. J. Mason and the witness Barker, both witnesses for the defendants. If the consideration of the defendants' testimony leaves any doubt as to the point, it is made entirely clear, in our judgment, by the testimony of the witnesses for the complainant. On this point the testimony of Mr. Mullins is especially valuable, since he examined the openings which existed on the ground in 1895 at which time he was part owner of the Point Pleasant and Pleasant View attempted locations and was then interested in showing the existence of veins and who testified that at that time there was no vein exposed.

For the purpose of showing more clearly the character of any material exposed in shafts 1 and 2, Mr. Mills, a witness for the complainant, testified that shortly before the commencement of the taking of the testimony in this case in December, 1911, he sunk both shafts, 1 and 2 to an additional depth. When he began working in such shafts they had the appearance of being recently cleaned out. They had never been previously sunk to a greater depth than they were when he began such work. Shaft 1 then had a depth of 12 feet and shaft 2 had a depth of 9 feet. He sunk shaft 1, six feet deeper and shaft 2, 7 feet deeper. Shaft 2 when he began work on it had just reached bed-rock on one corner (T. 1553-1554). Everything was disclosed in those shafts at the time of taking testimony that could possibly have been disclosed in them prior to May 11, 1891, and in addition also that was exposed which was opened up by the deepening of such shafts. It appears from defendants' witnesses that there is a showing of white granite, otherwise known as aplite in shaft 2. This rock, like gray granite, from which it differs in color on account of the absence of the darker materials, composes a part of the country rock in the Butte district, occurring, however, in greater quantities in some portions of the district than in others. As it occurs in the earth it bears no resemblance to a vein, at least not to such veins as are found in the Butte district, except that it sometimes occurs in dikes of more or less regular shape.

A miner who has not made any special study of rocks might by simply examining pieces of iron-stained aplite produced in the courtroom, mistake them for material which came from a vein, but there was no witness called in this case, either for the complainant or defendants, who might properly be classed as a miner who did not state that the occurrence in shaft 2 was aplite and not a vein or vein material. Such was the testimony of witnesses Watson and Barker for the defendants. These witnesses identified as aplite Defendants' Exhibits Nos. 31 and 57 produced by other of defendants' witnesses as samples of the vein material found there. Witnesses Watson and Gage, for the defendant, testified as to the absence of any vein in shaft 1. Mr. Barker did, however, testify that there occurred in the bottom of that shaft as it had been deepened by Mr. Mills what he called a vein having a width of about four inches, but which was not traceable, however, up to the surface of bed-rock. He produced a sample (Defendants' Exhibit No. 77) (T. 699). Such sample he says contains iron oxide, some altered granite and probably also quartz (T. 699). The statement of this witness that such material constitutes a vein must be considered in the light, however, of other statements in his testimony as to what is necessary to constitute a vein. His statement is that mineralized rock in place is a vein without regard to its value and without regard to whether the indications are sufficient to justify a miner to follow it in the pursuit of ore (T. 834-775).

It is easy to understand how a person might mistake for vein material samples taken from an aplite dyke near the surface where the broken rock is more or less iron stained by the iron coming from adjacent gray granite. Iron according to the testimony is one of the constituents of gray granite and when the granite is broken up, as it frequently is near the surface and is subjected to the action of the atmosphere, the iron becomes oxidized and spreads more or less to adjacent rock and gives it an iron-stained appearance. In the Butte district one of the principal characteristics of the veins in the oxidized zone is the iron stain due to the oxidation of the iron in the vein, all of the veins carrying more or less iron. The complainant's witness Mullins when first shown in the courtroom Defendants' Exhibits Nos. 31 and 57 which were taken from shaft 2 as well as certain other samples of aplite taken from other portions of the Butte and Boston placer, made such a mistake, but corrected such statement after visiting some of the places from which such samples came (T. 558). Mr. Barker, however, defendants' chief witness pronounced them aplite and not vein material. To the unpracticed eye the resemblance of such samples to vein material may be seen by comparing them with Defendants' Exhibit No. 112 which was a sample of vein material produced by the witness Warner from the oxidized zone in the Motheral vein. (T. 1260.)

It is well to notice in this connection, however, the

fact that notwithstanding such superficial resemblance, the trained eye can readily distinguish. All of the mining engineers who testified for complainant were shown a vast number of samples on cross-examination but were able in every instance to tell which of them came from a vein. Their testimony explains that while the principal constituents of aplite is the same as that of vein quartz, namely, silica and that there is a similarity of color that there is a structural difference observable under the magnifying glass by which the two can be readily distinguished. The appearance of the unstained aplite may be seen by examining complainant's exhibit No. 21 produced by witness Winchell from the country rock lying within fifty feet to the west of the Hornet discovery and in the course supposed by the defendants to be followed by the vein which they claim is disclosed in that shaft (T. 246). According to Mr. Winchell, miners have sometimes mistaken aplite dikes for vein quartz. It is not to be supposed, however, that since such mistakes have become general knowledge there is any likelihood of the experienced miner in the Butte district mistaking an aplite dyke for a vein. Except for the occurrence of an iron-stained silicious rock within walls, practically all the characteristics of a vein would be lacking in the aplite dyke. The witness Winchell as well as several other witnesses have indicated to some extent the dissimilarity.

Complainant's witnesses, Kennedy and White,

though only qualified to give an opinion by reason of their experience as practical miners, testified that there was no vein in either shafts 1 or 2. Their testimony on cross-examination is sufficient to show that a miner of only limited experience would not be so far mislead as to sink on anything occurring in either shafts 1 or 2 with the expectation of finding ore.

Concerning shaft 1 Mr. Winchell testified for the complainant that the only thing disclosed there is country granite (T. 241). He produced a sample from the bottom of the shaft (Complainant's Exhibit No. 18). A brownish stain appearing on the sample is, he says, due to the oxidation of the iron contained in the granite and has nothing whatever to do with vein mineralization (T. 241), although the same kind of brown discoloration might be produced by the oxidation of iron pyrite. This witness having been shown defendants' exhibit No. 5, a sample of material said to have been taken from shaft 1, said concerning it: "That is rotted granite stained chiefly by iron. There is a little reddish brown coat upon some of the pieces which may be hematite or hematite mixed with cuprite. In speaking of cuprite I mean in common terms red oxide of copper. It is derived just as the iron from the rotting of the rocks and the assembling of the copper and the iron upon joint fractures and coating the surface of the fragments of the rock either in the wash or below it." (T. 242.) There is no vein or vein mineralization of any sort whatever in shaft 1 (T. 242).

Concerning shaft 2 this witness says that it is in granite somewhat rotted and discolored by weathering and that a little aplite shows. It doesn't show a vein or any stringer of quartz or mineralization (T. 243).

The statements of Mr. Winchell were corroborated by testimony of the other witnesses for the complainant upon whose judgment the court will, by the reading of their testimony, be convinced that it may place reliance.

The Hornet discovery, together with the connected openings, which connected openings were begun to be made about ten years after the date of the placer application are shown on the maps, complainant's exhibits Nos. 15 and 16. The position of the Hornet discovery is also shown on defendants' exhibit No. 1 and complainant's exhibit No. 14. The tunnel running in a westerly direction about thirty feet north of the Hornet discovery is referred to in the testimony as the "Mullins tunnel" and was run by Mason and Merriman as heretofore stated in 1900. Mr. Mullins sank the shaft connected with it, which shaft is referred to in the testimony as the incline shaft. In considering the testimony in connection with the Hornet discovery, the court should keep in mind the fact that the Hornet discovery has been once filled up and afterwards re-sunk, but not exactly in the same place as when originally sunk, and since having been re-sunk the shaft has been considerably deepened and its size from time to time enlarged. A cross-cut also has

been run in a southwesterly direction at a depth of seventeen feet below the surface. A description of the connected workings and time when they were made has been heretofore in part given. The work of making such connected workings began in the year 1900. The first work done after the re-opening of the Hornet shaft and the running of a cross-cut to the southwest was the sinking of the Gulf discovery to a depth of about 24 feet, and the running of a cross-cut north from the Gulf discovery. Next came the running of the Mullins tunnel so as to connect with the north end of such cross cut, and later the extending of such cross-cut south of the Gulf discovery so as to connect with the Hornet discovery. Still later came the sinking of the incline shaft on the vein which showed in the Mullins tunnel (which vein had a width of three or four feet), and the stoping out of the ore within the walls of such vein to a depth of 200 feet. Lastly the Hornet discovery was deepened and a cross-cut run north from the bottom of it so as to connect with one of the stopes on such vein and a cross-cut run from the bottom of such shaft as deepened in a southerly direction.

For the purpose of showing the existence of a vein in the Hornet discovery the defendants introduced certain testimony showing the presence of mineral there. Their principal effort, however, appears to have been to show some connection between such mineralization as was disclosed in the Hornet discovery with the Mul-

lins vein. In order to show such connection, testimony was offered to show that the ground which lay between the so-called Hornet discovery and the Mullins vein was all mineralized, and further that certain streaks along the northerly wall of the Hornet discovery shaft which are more highly mineralized than the surrounding earth could be traced into the Mullins vein and that they are stringers connecting with such vein.

The complainant's witnesses do not dispute the existence of a small amount of mineral disclosed in the walls of the so-called Hornet discovery. As to this point the main controversy between them and most of the witnesses for the defendants is as to the extent of such mineralization. The testimony of the complainant's witnesses is to the effect that in the Hornet discovery such mineralization is slight and that it is shown by its character and that of the surrounding country to be a mere superficial deposit, and is utterly valueless, and being a mere superficial deposit would not justify a miner to sink or to do further development with the expectation of finding ore. Also it lacks such definite boundaries as are necessary to constitute a vein. Their testimony is further to the effect that there is absolutely no connection between any mineralization in the Hornet discovery and the Mullins vein and that such mineralization did not have its origin in any mineral contained in such vein or any vein.

For the most part defendants' witnesses admit that such mineralization as is shown in the Hornet shaft

is of no value. They admit that the Mullins tunnel and the incline shaft shows at least one well defined wall, the same being the hanging wall of a vein, such hanging wall being about thirty feet north of the Hornet shaft. The defendants' chief witness, Mr. Barker, admits that two walls are disclosed in the Mullins tunnel. The testimony of this witness strongly indicates the existence of a vein in the Mullins tunnel but not to the south of it. He repeatedly refers to the occurrence in that tunnel as "the vein." He said: "The very widest place that I could find in that tunnel between two walls is two feet and that is just east of the point where in the back it gets into the wash. A little bit east of that where *the vein* is dislocated for a distance of one foot it shows a throw to the south. *The vein is about one foot wide*, but nowhere east of that do I find more than eight inches and in places I do not find any distance between the walls." (T. 721.) To the same effect is the representation undertaken to be made on the map Defendants' Exhibit No. 90 by this witness of that which occurred in the Mullins tunnel (T. 721). This represents the walls of the Mullins vein and also the north and south fault dislocating such walls (T. 722). Concerning the map he testified: "Beginning at the face of the tunnel and going to the west it represents *the vein* as I can see it between the walls at the bottom of the tunnel. Just west of the winze where the vein is broken I could not see the walls of the vein and the red marking just to the west of where

the vein is broken shows its size in the top or back of that tunnel" (Tr. 722). This witness also stated that the fault shown in the floor of the cross-cut running from the Mullins tunnel as far south as the Gulf discovery is correctly represented on complainant's exhibit No. 15. His theory as to the source of the mineralization of the Hornet shaft is stated as follows: "It is possible, and I think it is true that the streak in the Mullins tunnel was one along which the vein solutions flowed and enriched that to a greater extent, but thereafter, or possibly at the same time the replacement of the copper by the granite both to south and north of that point was made which facts are similar to those that are found in the mines on the west side." Defendants' witnesses claim that portions of the earth or rock shown on the walls of the Hornet shaft run as high as two per cent. It is not contended, however, that it could be treated, the value not being sufficiently high to allow it to be profitably treated in a smelter without concentration and the mineral being too light to permit concentration by water. On that account the methods of concentration by water now in use would not serve to separate the mineral or mineral bearing rock from the waste material.

The defendants do not claim that the samples taken by them are representative or are intended as average samples of any considerable portion of the earth or rock disclosed in such shaft. They were taken merely with the idea of showing the richest samples which could be found (T. 169).

There is some testimony on the part of the defendants that on the north side of the Hornet shaft and near the foot of a cross-cut which runs to the north there is a streak which is more highly mineralized than the rock on either side of it. Mr. Watson stated that it is a flat lying stringer (T. 425), while Mr. Barker stated that it had a dip of about forty-five degrees to the north and he undertook to connect it with another streak shown in the cross-cut running north from the bottom of the Hornet shaft and gave the opinion that such streak could be traced into the Mullins vein (T. 792).

In view of the admission of defendants' witnesses of a fissure both walls of which were disclosed in the Mullins tunnel and the contention that mineralization which was originally confined to such fissure had so affected the country rock to the south as far as the Hornet shaft as to change such country rock into vein material, we are unable to perceive in what way the case of the defendants would be benefited by showing the existence of such a stringer connecting with the Mullins vein. Evidence on the part of the defendants tending to show the existence of such a stringer tends to disprove their contention as to such extension of the Mullins vein. It is evident that the defendants consider that it is essential to the making out of their case that they show either that such stringers connect with the Mullins vein or in some other way that that which is shown in the walls of the Hornet shaft is a part of such vein. We are unable to see how

their case would be strengthened if they were to succeed in such contention, since the decision of the case can only be affected by what was disclosed in the Hornet shaft to the extent that it was opened up on or prior to May 11, 1891. If what was then disclosed there is in fact a vein they should be able to show that fact without the aid of anything disclosed by subsequent development. If what was then disclosed in the Hornet shaft was not sufficient to show the existence of a vein then they cannot claim that a vein was discovered at or prior to the date of the placer application. If the showing in the Hornet shaft to the extent that it was opened up on or prior to the date mentioned was not sufficient to justify exploitation and development then the case of the defendants is not aided by showing that if such development had been further extended it would have encountered material which would have justified such exploitation.

While admitting that there are apparent walls of a vein shown in the Mullins tunnel the witnesses for defendants, with one exception (whose testimony will be hereafter referred to), contend that such walls do not mark the real boundaries of the vein. They claim that it extends sufficiently far south to embrace the Hornet shaft, but they are utterly unable to say how much further it extends in a southerly direction or to what distance it extends in a northerly direction. A cross-cut runs southwest from the Hornet shaft, 30 feet below the surface, and a cross-cut runs

southerly from the bottom of such shaft, both of which show through their full length the same mineralization that is shown in the Hornet shaft.

Defendant Mason testified that he cannot say that there is any hanging wall shown in the Hornet shaft (T. 102). He makes no contention, of course, that any foot wall is shown because according to his theory that would be found some place to the north. The testimony of defendants' witness Watson on this point is as follows: "I did not find any evidence of any wall in the Hornet discovery itself. In this drift that runs to the southwest there is a talcy seam that might be taken for a wall" (T. 316). In another part of his testimony he said: "I wouldn't say that the foot wall might be a thousand feet north. I wouldn't say that at all. This is all probability. I say the foot wall is not shown there. The hanging wall is just about as indefinite as the foot wall. I hardly think that the hanging wall is disclosed in the Hornet shaft at all or in any cross-cut which runs in a westerly or southwesterly direction from the Hornet shaft" (T. 315-316). He also says that the talcy seam referred to he did not consider as a wall and that the hanging wall is some indefinite distance further south. It might be one thousand feet or it might be anywhere (T. 315).

The defendant Clark in testifying concerning the Hornet shaft and the existence of walls, and being particularly questioned on cross-examination as to the existence of a wall said: "Well it looks to the south

there as though it is not so highly mineralized as it is on the other three sides of the shaft."

Witness Barker admitted that if definite boundaries are necessary to constitute a vein that there is no vein shown in the Hornet shaft (T. 773).

Defendants' witness Gage who testified as to the existence of a vein in the Hornet shaft says that definite boundaries are not necessary to constitute a vein (T. 568).

Defendants' witness Clark said: "I do not think there is a visible wall in the Hornet discovery shaft." (T. 299.)

Defendants' witnesses not only were unable to fix any definite boundaries for the mineralization that is disclosed in the Hornet shaft, but their testimony as a whole, indicates that the same kind of mineralization extends through a very large but indefinitely defined portion of the adjacent country and not only shows the fallacy of the theory advanced by Mr. Barker that the mineral which had filled the fissure shown in the Mullins tunnel had attacked the adjacent country rock to the south and by the process of replacement had converted into ore that which was originally granite, but such testimony also tends to support the statements made by complainant's witnesses as to the source of such mineralization.

Defendants' witnesses do not claim such slight mineralization as occurs in the Hornet shaft is different in character from the mineralization which is found

over a large extent of adjacent territory. The witness Barker admits that where the Hornet shaft now is there was at one time over-laying granite to the extent of at least several hundred feet, that such granite contained copper in the form of calchopyrite in minute particles disseminated more or less evenly throughout the mass and that the copper so released by disintegration and oxidation remains as a superficial staining of the district. Such copper appears now in the forms of silicate and oxide of copper.

The testimony of the defendants' witnesses is sufficient to indicate the occurrence of chrysocolla and cuprite in the surface wash, in cracks in the country rock near the surface and to some extent throughout the mass of the granite near the surface in the territory embracing a somewhat extensive scope of country in the vicinity of the Hornet shaft and that such occurrence is a peculiarity of that portion of the Butte district. Defendant Clark states that the occurrence of chrysocolla is peculiar to that vicinity. He testified as to the existence of pieces of green-stained rock with rough edges indicating that it had not traveled far in the western portion of the Butte and Boston placer (T. 588). He testified that he operated the Pacific which almost immediately joins the Butte and Boston placer on the east and is less than one hundred feet east of the Hornet shaft. His work there began in the spring of 1899 and ended in 1902, since which time it has not been worked. He testified as

to the existence there of what he terms a fault and says concerning it: "I couldn't say we had any walls. The cross-cut is in what I would call vein material. We cross-cut north on the fault on the three hundred. We did not get through it. We run a cross-cut sort of southeast on the fault on the three hundred. We did not get through the fault there. We were cross-cutting practically north and south. The cross-cut was in what Mr. Winchell called aplite, broken up in places and seamy; rich ore in seams" (T. 608-609). The only ore shipped from there was a wagon load.

The work on the Bullwhacker to the south was on the continental fault which runs north and south and passes between the Hornet discovery and some portion of the Pacific claim. Defendants' witness Barker said that there was a green-stained rock mined on the fifty-foot level, but the green stain disappeared entirely on the four-hundred foot level (T. 738). The material at the four hundred foot level was a clay-like substance. (T. 738-740.) Clay is the kind of material you would expect to find in a fault. The chrysocolla found in the ground in that vicinity but outside of the Hornet shaft and connected workings may be due to descending solutions, that is by the rainfall and melted snow carrying copper in solution sinking into the ground and coming into contact with an excess of silica (T. 765). He states that aplite contains from ten to fifteen per cent. more silica than gray granite and that the stain in the cross-cut from

tunnel 31 and outside of the vein which exists there may have been formed in that way, and he further states that chrysocolla and cuprite are not soluble in water at ordinary temperature and pressure.

Witness Mason testified to having seen chrysocolla and cuprite in the earth above bed-rock in the so-called Pleasant View discovery. His testimony is that on the 14th or 15th of April, 1891, that he found about fifty pounds of copper ore at the collar of the shaft which had been thrown out in sinking. This ore was very green in color and pieces broken off from it contained red oxide. In the testimony of this witness given in a former trial and introduced in evidence in this case, he said concerning Pleasant View discovery: "This month it was when it was cleaned out and sunk down eighteen inches or so deeper and showed that it was not a regular vein but a body of quartz that was deposited there, then I came to the conclusion that there was no lead there in sight" (T. 1089).

In sinking shafts 5, 6 and 3 in which he doesn't contend that any vien was disclosed, he found copper stain. Pieces of red copper ore were found promiscuously over the surface of Butte and Boston placer and on the adjoining claims. He found cuprite and chrysocolla in the material taken out of shaft 9 and he stated that he sunk it from a depth of 20 feet to 48 feet (T. 1001). There was no wall exposed in sinking that shaft.

Defendants' witness Dean testifying concerning the

general dissemination of the green-stained material said: "Well it is below bed-rock, you wouldn't say it was float."

We have already referred to the admission on the part of the defendants' witness Barker to the effect that some of the copper in and in the vicinity of the Hornet shaft and connected workings has its origin in the calchopyrite disseminated through what was once the overlaying granite. That being true, why look to the Mullins vein as the source of any part of such copper, there being no evidence except its mere proximity indicating that it is the source. Of course, the fact that there is more copper in the country rock immediately adjacent to the Mullins tunnel than there is in the country rock as far south as the Hornet shaft doesn't indicate that the copper in the vein has become to any extent distributed through such country rock. The evidence shows the occurrence of several fault fissures, one of which is shown in the floor of the cross-cut running south from the Mullins tunnel as far south as the Gulf shaft. Since such fault fissure would furnish a channel for the free circulation of water, it would, of course, contain more copper if we assume that the copper came from the calchopyrite of the granite, for according to our assumption such copper becomes dissolved and is carried and deposited by the water. Since the fault fissure would carry more water than the more or less solid granite on each side there would naturally be in such channel

a greater deposit of chrysocolla. As many of the samples of defendants' witnesses were taken along the floor of such cross-cut and in the course of such fault (T. 217), they would naturally show more copper near the Mullins tunnel, as the occurrence of such fault is shown north of the Gulf shaft but not south of it. If some of the mineral in the vein was carried into such fault fissure it would not in that way reach the Hornet shaft, for the fault fissure runs to the north of such shaft. It is evident, however, from the testimony that the mineralization of the Mullins vein did not extend into the fault fissure and was not carried into the adjacent country through such fissure. It is evident that the vein fissure was formed before the fault fissure, for the reason that the vein fissure is cut and dislocated by such fault. Not merely was the vein fissure cut by such fault, but the vein filling was also cut, which is shown by the fact that there is a dislocation of the vein filling as well as the walls of the fissure. As the line of fracture made by the fault within the vein has not become obliterated it is not to be supposed that a portion of the mineral of the vein filling has been carried into the fault fissure.

The effort of the witness Barker to show that that which was country rock south of the Mullins vein has been converted into ore by the process of replacement entirely failed. It is conceded by this witness that when ordinary gray granite is subjected to the action of a solution of copper sulphate and the granite changed

into ore by replacement, that the darker constituents, that is the ferro magnesium is carried away and is replaced by copper and the granite so changed into ore is distinguishable by the absence of the dark specks which the granite contained before. It is admitted, however, by defendants' witnesses and otherwise abundantly proved that the rock forming the walls and bottom of the cross-cut south from the Mullins tunnel has no such appearance. It is not contended that the samples taken by the complainant's witnesses from the Hornet shaft and the cross-cut north of it do not represent the main body of the material found there.

Mr. Mayger, a witness for the defendants, states positively that there is no vein in the Hornet shaft. He passed through all of the openings connected with it (T. 375-376). The only vein that he states that he saw is a vein about five or six feet in width which was encountered in a stope near the Mullins winze, which is the same vein shown in the Mullins tunnel, but at a greater depth. He said: "I think there was five or six feet of ore there that would show ore. I didn't notice especially what the country rock on both sides was, but I rather think it was granite" (T. 375-376). The width given by him to the vein is about as represented on complainant's exhibit No. 15. If such vein extended so far south as to reach the Hornet shaft the width must have exceeded thirty feet.

If the case is considered on defendants' testimony alone it is evident that the conclusion must be that

there is no vein in the Hornet shaft and there was none shown in any opening made there or near there, on or prior to May 11, 1891. The fact that there was not and is not any such vein there is established by the testimony of complainant's witnesses in rebuttal beyond controversy. It will not be necessary here to undertake to give anything like a detailed statement of such testimony. The geology is represented on the maps, complainant's exhibits Nos. 14 and 15, which maps represent the facts as they were testified to by eight or more witnesses for the complainant, which witnesses represented all of the different grades and classes of employment in the mining industry.

The testimony of witness Winchell may be taken as representative of such. He testified to an experience as a mining geologist extending over a period of twenty years. From 1898 to 1906 he was mining geologist for the Anaconda Copper Mining Company and for fourteen years past has been familiar with the underground developments and the geology of the Butte district. A few weeks before he gave his testimony, which was on January 12, 1912, he made an examination of the ground in that vicinity. His statement as to the source of the staining and slight impregnation of the country rock in that vicinity with copper of a greenish color and the deposit in the joint cracks and in the fault fissures near the surface of small quantities of chrysocolla and cuprite, is that the granite which in part composes the country rock,

contains until eroded and acted upon by the oxygen in the air, minute particles of copper in the form of calchopyrite, and that in the vicinity of the ground in controversy, on account of the quantity of aplite, this copper when released by weathering, forms chrysocolla or silicate of copper and cuprite or oxide of copper, which on account of their insolubility, are not carried away by the action of surface waters. These substances are deposited near the surface in cracks and permeate the country rock near the surface to a greater or lesser extent, the stain being carried in any rock that will absorb moisture, and such staining which occurs in the country rock near the surface, of course, forms a part of the wash which overlays the bed-rock. The wash itself is composed of portions of broken up and disintegrated country rock which was originally, of course, bed-rock. His description of the Hornet shaft, the Mullins tunnel and connected workings is as follows: "These workings are shown on a large scale on complainant's exhibit No. 15. The Hornet tunnel passes into the bed-rock at a distance of about eighty feet from its portal. It here encounters what I have been accustomed to call the Mullins vein. I believe it has been referred to as the south vein in this hearing and it follows this vein to its eastern face, a distance of about 120 feet. The vein has a rather flat dip to the south. It varies in width from a few inches to a few feet. It has a very well marked hanging wall and an equally good

foot wall. It dips to the south at an angle of about sixty degrees. The Mullins shaft to which I referred as having been sunk several years ago and examined by me at the time, followed this vein upon its dip. I think the upper part of the shaft passing through the wash was vertical and then it followed the dip of the vein, some two hundred feet, at which point there was a drift extending to the east. The vein still retained its flat dip to the south and contained a foot or eighteen inches of copper ore. The mineralization in this vein is that commonly found in the veins of this camp. It contains quartz and the copper minerals. Near the bottom or east from the bottom of this shaft I recall the ground had caved in from the hanging, making what is practically a cross-cut into the hanging. The country rock disclosed there was a very excellent article of granite, very little discolored or stained by copper. There are two or three small fault slips across the vein in the Hornet tunnel. One of these which is apparently the most persistent and important is followed in the cross-cut extended from the Hornet tunnel to the south toward the Hornet discovery. This fault strikes north, ten degrees east and dips east seventy degrees. It contains the usual fault filling and some clay and the clay has been impregnated with chrysocolla. The country rock south from the vein in this cross-cut is granite and the granite itself is somewhat copper stained. There are also two or three little seams con-

taining small kidneys and streaks of high grade material, cuprite and chrysocolla. One of these seams I noted particularly between the Hornet discovery and the Gulf discovery, upon the eastern side, which had been very carefully excavated and picked out. The Hornet discovery shaft has been sunk to a depth of 37½ feet; through wash or surface debris to the depth of about 24 feet and below that point in granite. At the bottom of this shaft, that is the Hornet discovery shaft, there is a little cross-cut to the southwest all in copper stained granite. There is also a cross-cut to the northeast which reaches the Mullins vein at a distance of about eighteen feet from the Hornet discovery shaft. Between the shaft and the vein, the cross-cut is entirely in copper stained granite with a little cuprite in the joints. There is no vein disclosed in the workings of the Hornet discovery shaft, either upon the level of the Hornet tunnel nor the level at the bottom of the shaft. The level at the bottom of the shaft is exhibited with its geology on complainant's exhibit No. 16. There has been a small raise extended from the lower level upward upon the vein to connect with the Hornet tunnel. The vertical distance is probably about twelve feet. The vein, the Mullins vein, that is shown on the lower level has a width of from twelve inches to two feet and has the usual characteristics. The same small fault to which I referred as striking north, ten degrees east and dipping east seventy degrees, is seen in the lower level.

It has here a slightly steeper dip to the east. The dip of the vein is the same, south sixty degrees" (T. 249-252).

Concerning the question of an enlargement of the Mullins vein by the vein material attacking the adjacent country rock and changing it into ore by the process of replacement, the witness testified: "No there has been no enlargement of the vein. The country rock would be just as much discolored if there was no vein there and it would not mean a vein" (T. 252).

Concerning the occurrence of chrysocolla generally in the district, he said: "There is also over a large section of the country north, east and south of the Butte and Boston placer a very unusual discoloration of the country rock by chrysocolla. The rock is stained green. The chrysocolla has even been gathered together into little intersections of joints and into fractures which the rock contains. It has entered and discolored and to a certain extent mineralized the aplite. Its abundance has attracted the attention of all observers. Cross-cuts hundreds of feet in length, at no greater depth than fifty or seventy-five feet, show the entire country rock contains a green discoloration and sometimes little masses of ore; and chrysocolla is not the only copper mineral but there is also an occasional little seam or kidney of cuprite" (T. 237-238).

In discussing the testimony of the defendants' witnesses reference was made to certain statements as to the existence of a stringer which could be traced

from the north side of the Hornet shaft into the Mullins vein. We have already noted the testimony of the witness referring to the deposit of chrysocolla and cuprite in joint cracks and in fractures in the country rock. The occurrence of the joint planes was explained by this witness as follows: "When the ground cooled it participated in that contraction of which I spoke relative to cooling bodies and the contraction of the granite upon cooling produced throughout the mass of the granite joints. These joints frequently intersect or abut against each other making a honeycombed structure in the granite upon a larger scale, and a larger joint against which many of the smaller joints terminate is called a master joint" (T. 284).

This witness drew a diagram marked by the examiner for identification (Defendants' Exhibit No. 55), upon which is roughly illustrated the normal jointing of granite (T. 284).

For the complainant the witnesses Mullins, Kemper, Wilson, Warner, Fisher, Linforth, Berrien, White and Kennedy all testified as to the absence of any vein in the Hornet shaft.

The defendants' witnesses described the occurrence of joint cracks and the impossibility of tracing any seam occurring in the Hornet shaft into the Mullins vein or even as far as the lower cross-cut. Speaking of the lower cross-cut the witness Wilson said that on the right hand side, going north, is a seam containing chrysocolla and cuprite. It has no significance,

for it don't appear on the other side of the cross-cut.

Witnesses Linforth and Berrien took certain samples intended to represent the character of material shown in the Hornet shaft and the cross-cut to the north. Complainant's exhibit No. 31 was taken from the east side of the upper cross-cut beginning at a point three feet from the side of the tunnel and extending to a point seven feet from the side of the tunnel, one piece being taken from each foot of the distance covered, which practice was followed in taking all of the other samples referred to (T. 1368-1369). Complainant's exhibit No. 32 was taken from the east side of the same cross-cut covering a distance of twelve to sixteen feet south of the Mullins tunnel (T. 1370). Complainant's exhibit No. 33 was taken from a place in the same cross-cut extending from sixteen to twenty feet south from the Mullins tunnel (T. 1370-1371). Complainant's exhibit No. 34 was taken from the same cross-cut and from a place extending from twenty to twenty-four feet south of the Mullins tunnel (T. 1371). Complainant's exhibit 35 covered the remaining distance to the Hornet shaft (T. 1372). Complainant's exhibit No. 36 is a sample of five pieces taken from the east side of the Hornet discovery shaft and is a continuation of the last named sampling (T. 1373). These witnesses also took samples for assaying. The result of such sampling and the analysis was repreented on a map or sketch representing a cross-section through the Gulf cross-cut and is marked Complain-

ant's exhibit No. 37 (T. 1374). All of the samples are representative of the material from which they were taken (T. 1367).

The witness Kennedy described the mineralization in the Anaconda vein beyond the original walls of the fissure and described the ore there as white in appearance. Being shown defendants' exhibit No. 113, a piece of unaltered granite, he said that the ore there was whiter in appearance than such granite would be with the dark specks removed. The ore so formed by replacement in the Anaconda vein runs from four to five per cent. in copper. No green stain, whatever, was observable in it (T. 1551).

We consider the testimony of witness Mullins of special value, since in 1895, he was as already stated, a part owner in the so-called Pleasant View and Point Pleasant claims and on account of the litigation then pending was compelled with his associates to show the existence of a vein in order to support his claim of title by virtue of such attempted locations. He has no interest in the outcome of the present suit and is entirely disinterested. He states that in 1895 he made a careful examination of the ground and all prospect holes open and that he found nothing in the way of a vein which in his judgment would support such lode locations, and that the defendant Mason was then a partner with him and that Mr. Mason did not then claim that any vein existed outside of the Point Pleasant and Pleasant View discoveries. It appears that

one of his partners, Judge Hamilton, was a practicing attorney, and, of course, it was well known to Judge Hamilton (and Mr. Mullins and Mr. Mason are also presumed to know), that the Pleasant View location could be sustained on a discovery in the Hornet shaft if it was within the boundary of such attempted location and a vein had been discovered there prior to the date of the placer application and definitely ascertained and of sufficient value to justify exploitation. Mr. Mullins testifies, however, that in view of the situation he and his associates decided that they had no cause of action and decided that their best course was to endeavor to obtain a compromise of the litigation.

While Mr. Kemper is interested in the present litigation, we submit that under the circumstances, his testimony is entitled to great weight. He was one of the parties opposing Mr. Mullins in the litigation pending in 1895. Both he and Mr. Mullins testified that after the compromise of that litigation the subject of making lode locations covering the ground so as to prevent further litigation was discussed and the idea was abandoned on account of the fact that nothing could be found upon which in their judgment a valid lode location could be made. Both of them, of course, knew that the subsequent discovery of such lodes might be a source of litigation and it stands to reason that if such lodes were then known to exist or were discoverable by reasonable effort, that such lode locations

would then have been made, and the fact that they were not made, is very persuasive evidence of the fact that none were known to exist.

The discussion of the evidence so far has related to the existence of veins discovered within the limits of the Butte and Boston placer on or prior to May 11, 1891. Before patent was issued covering the Butte and Boston placer, the placer applicants were required to make proof that the ground was in fact valuable for that purpose, and of course, the issuance of patent conclusively determined that such ground in fact was placer ground. Counsel for defendants asked certain witnesses concerning the relative value of the ground at the date of the placer application for placer and quartz purposes, and in answering such questions one or two witnesses stated that they had taken samples in two or three places, but not, however, from the surface of bed-rock (the place where placer gold would be looked for), and washed such samples but found no placer gold, the complainant preserving the proper objection. In view of the fact that such evidence was inadmissible and the further fact that the question as to the placer character of the ground has been conclusively determined by the issuance of patent, the complainant offered no testimony on the subject. With such flimsy testimony as a basis, counsel for the defendants in the oral argument in the trial court completely ignoring the fact that the certificate of placer location states there had been a discovery of clay as

well as placer gold, spent considerable time in an apparent effort to lead the court to the conclusion that the location of the ground as placer ground had been fraudulent and had been made with the design of getting from the government the title to ground in which it was expected that valuable leads would be afterward discovered if they were not then known to exist, notwithstanding the fact that if veins were then traceable on adjacent ground and into the Butte and Boston placer, that a discovery of them within the Butte and Boston placer could have been made and patent obtained for such lode claims by the payment to the government of an additional sum not exceeding $12.50. The argument reaches the limit of absurdity. In order to defeat the title of the complainants, it is necessary to show veins known to exist, but if it were sufficient to show that such veins were merely supposed to exist within the Butte and Boston placer, the case of the defendants is equally weak.

The most important witness for the complainant is the judge who presided at the trial of this case, since he visited the ground and all of such openings after having heard the contentions of the different parties as to what was to be found there.

If veins had been discovered in the Butte and Boston placer on or prior to the date of placer application they could not answer to the designation of veins known to exist unless they were then definitely ascertained and of such value as to justify exploitation and

development. Defendants offered no testimony on the question of whether what they claim as veins in the openings referred to would have justified exploitation or development at the date of the placer application. Such questions as were propounded in any way relating to that question were asked in the present tense and called for a statement from the witness as whether or not such exploitation would have been justified at the time the question was asked. There was no attempt to show that the conditions at that time were the same as they had been twenty-one and one-half years previous when the placer application was made. It might be possible, of course, that in the meantime there had been such development of adjacent property or other change of conditions as to justify sinking on a vein or indications of a vein which would not have justified exploitation in the absence of such development. A suitable objection was made by complainant to all of such evidence and the attention of counsel for the defendants called to its insufficiency.

If it were assumed that veins with defined boundaries were shown in all of the openings referred to, and if it were further assumed that all of such veins were of sufficient value at the date of the placer application to justify exploitation and development, it could not be contended that such veins were then definitely ascertained beyond the openings made by the sinking of the prospect holes referred to. There was no development beyond the sinking of such shafts or pros-

pect holes. As a vein to be excepted from a placer patent must be definitely ascertained, it is evident that it is only to the extent that it is so ascertained that it is so excepted. If a vein is disclosed in one of such prospect holes such vein is definitely ascertained to the extent that it is so disclosed, but to no great extent. Its existence is known to the extent that it is exposed. Its existence beyond the place where it is so exposed rests upon mere conjecture. If the existence of veins were shown in all of the prospect holes referred to only so much of such veins as were so exposed could, under any circumstances, have been excepted from the placer patent.

SECOND.

We have so far considered the Butte and Boston placer as a whole but not separately the westerly two-thirds which is the part in controversy in this case. The Butte and Boston placer is represented on the map, Defendants' Exhibit No. 1, the boundaries being indicated by the line with a pink border. The portion of the Butte and Boston placer which is in controversy in this case is also indicated on such map, the corners being indicated by the letters, A, B, C, D, E, F, G, H. The prospect holes and openings claimed by the defendants to have been made on or prior to May 11, 1891, namely, Pleasant View discovery and Point Pleasant discovery, shafts 1, 2 and 9 and also the Hornet discovery are also indicated on this map.

The Point Pleasant discovery is indicated by the letter "A" above the figure 3016. With the exception of the Pleasant View discovery in which it is practically conceded that no vein was discovered, all of such prospect holes are outside of and some distance to the east of the ground in controversy. If the defendants had been able to show the discovery of veins in such prospect holes prior to the date of placer application, how could that affect the ground in controversy. Undoubtedly, it is the veins and the veins only (with a limited area of enclosing surface ground), which under any circumstances may be excepted from the placer patent. If veins had been discovered in such prospect holes but such veins did not enter the ground in controversy, how could it be said that the ground in controversy was affected by their discovery, and since the production of the placer patent together with proof of conveyance from the patentees to the complainant, as to the ground in controversy makes out a prima facia case for the complainant, as to such ground, in the absence of proof that any such veins assumed to have been discovered in fact extend into the ground in controversy, the case must be considered as though they do not in fact so extend. Indeed proof merely that such veins did extend into such ground would not be sufficient without proof of their situation within such ground, since it is only the veins with a definite area of enclosing surface ground which may be excepted.

Viewing the case from the date of the placer application it will be readily conceded that there was not then a discovery of any vein within the ground in controversy.

THIRD.

The defendants do contend, however, that by development work done within the year preceding the taking of the testimony in 1911, two veins which they designate as the north vein and the south vein had been traced as far westerly, respectively, as shafts 21 and 19, both of which are on the extreme eastern border of the ground in controversy, and we understand their contention to be also that such veins continue in a westerly direction and through the ground in controversy, though they have not undertaken to supply any evidence of the courses followed by such veins westerly from such shafts, or indeed to furnish anything which may be considered as evidence of the continuance of such supposed veins or either of them west of such shafts.

The contention of the complainant is that they have not traced any veins westerly as far as either of such shafts; that there is a north and south fault in fact shown in each of such shafts but nothing else, and that the existence of any vein within the ground in controversy has not been shown at all. We have heretofore referred to the vein shown in tunnel 34, the Mullins tunnel, as the Mullins vein. Defendants, as we have

already stated give such vein a much greater width than given to it by the complainant's witnesses, defendants' claim being that it is shown in the Hornet shaft. Defendants have referred to such vein as the south vein. Some of the defendants' witnesses have claimed that its course can be projected in a westerly direction through tunnels 35 and 36 and into shaft 19. Most of the witnesses for the defendants do not claim that there is in fact any vein shown in tunnel 35 or 36. Except for such tunnels there is no exploration of bed-rock between shaft 19 and tunnel 34, and such opinions as were given as to the Mullins vein being shown in such tunnels or in shaft 19, is evidently pure conjecture based mainly on an attempted projection in a westerly course of the vein on the strike which it is shown to have in tunnel 34. Complainant's witnesses have pointed out that if such vein continued on such strike in a westerly direction, it would not be encountered in any of such workings. As there is a decided slope of bed-rock to the west and the vein is south dipping, the apex of the vein as exposed on bed-rock would have a decided southwesterly trend though the strike of the vein on a horizontal plane be nearly east and west. The uncertainty, of course, is greatly increased on account of the known existence of at least one north and south fault between tunnel 34 and shaft 19 which would have the effect of cutting and dislocating such vein where it intersected it, but the extent of such throw is an unknown quantity. The occurrence in shaft 19 has no

resemblance to that portion of the Mullins vein exposed in tunnel 34. If a vein were in fact exposed in the bed-rock in shaft 19 there is no proof of its being the same vein as is shown in the Mullins tunnel.

At the time of the commencement of the testimony there was an exposure of a small amount of ore in the north cross-cut from tunnel 31. Such cross-cut having been driven and such exposure made within the last few years, and many years after the date of the placer application. During the time of the taking of testimony and after Mr. Winchell's testimony was given such cross-cut was extended further north and a considerable body of ore exposed. For the purpose of the argument the complainant concedes the existence of an east and west vein there with a strike as indicated on complainant's exhibit No. 17. The defendants claim that the same vein is exposed in the north cross-cut from shaft 9, also in shafts 1, 2 and 21, although anything exposed in such shafts bears no resemblance to anything exposed in the north cross-cut from tunnel 31. As the vein in the north cross-cut from tunnel 31 has such a strike that it could not possibly be encountered in any such shafts if it continued on the same strike they undertake to account for the irregular course which it must follow to reach all such openings by assuming the existence of north and south faults between such points and such successive dislocations of the vein as to cause different portions of it to be exposed in each of such openings, and in order to make

their theory fit the facts they have to assume that at one place the throw of the vein going to the west is to the north, and at another place the throw of the same vein and by the same kind of faulting is toward the south. It can only be said concerning such testimony that it is not only guess work but very poor guessing.

Many years after the date of the placer application, there was certain development in what is known as Mineral application No. 888, a patented placer claim which immediately joins the Butte and Boston placer on the west. In doing such development a number of veins were explored, one of which known as the Donner vein, was explored for a distance of about three thousand feet along its strike and to a depth of about 1200 feet below the surface which in most parts of the vein is at a depth of about six hundred feet below the surface of bed-rock. Such vein is indicated on the map, Defendants' Exhibit No. 115, and though the vein is considered as remarkable for its regular strike it will be seen by looking at such map that its strike varies greatly. If projected on its average strike toward the east, it is conceded that it would not be encountered in either shafts 9, 2, 1 or 21, or in tunnel 31, or in any of the connected workings. As it is a north dipping vein no identity is claimed between it, of course, and the Mullins vein. The most easterly development on this vein at the time of the taking of the testimony, was distant about

four hundred and fifty feet from the west boundary line of the Butte and Boston placer.

Referring to the effect of faulting Mr. Barker testified concerning the continental fault, the main fracture of which runs in a north and south direction, a short distance east of the Hornet shaft, to the effect that such continental fault had been explored from Park Canyon on the north, to a point probably two thousand feet south of the Butte and Boston placer, that is a total length of about a mile. This fault has dislocated all east and west veins throughout its course. He has never been able to determine the amount of such dislocation (T. 742). To the west of the continental fault there are certain parallel fissures. It is impossible to say just how many because there is no continuous working from the continental fault to the west for any great distance (T. 743; 814). On cross-examination this witness conceded the existence of such north and south fault at the point where shaft 21 is and where complainant contends that there is such fault exposed and not an east and west vein. He testified as follows: "These same agencies that produced the fault, this continental fault which runs east of the Hornet shaft probably produced the condition which I have explained between tunnel 30 and the Pittsmont shaft. Between tunnel 30 and shaft 21 there is very great difference in the elevation of bedrock. In a horizontal distance of about 150 feet

there is a vertical depression of about one hundred feet. That would be very steep indeed about a cliff. That is the difference in elevation such as would be brought about by a north and south fault. I think that faulting has had to do with the subsidence of the ground there" (T. 745). Speaking of the ground lying west of shaft 21, this witness testified on direct examination as follows: "Going into the Pittsmont ground there must be another drop because in the Pittsmont shaft it was over 600 feet to bed-rock" (T. 743-744). Referring to the occurrences in shaft 9, the Rabbit, the Vesuvius discovery, tunnel 31, shafts 1 and 2, tunnel 30 and shaft 21 the witness said that he thought they were the same vein, but by faulting subsequent to the formation of the vein they had been dislocated so that the continuity of such vein had been destroyed. He also said that there was nothing which would enable him to tell the extent of such dislocation, that the direction of the throw is a matter of conjecture, and that there is nothing in the nature of drag shown upon the ground which would prove which way the throw has been (T. 788). Beginning at shaft 21 and going in an easterly direction the different occurrences claimed by Mr. Barker to be a part of the same vein are described by him as follows: In shaft 21 there are no walls of a vein shown and he claims nothing to indicate the strike except the occurrence of certain strata in the bottom of the shaft. In the south cross-cut from tunnel 30, one

hundred and fifty feet to the northeast he says a few inches of quartz is encountered having an east and west strike, and about two hundred feet easterly from there in shaft 1 he says a vein is found having an east and west strike and about five or six inches in width. About one hundred feet then in a southeasterly direction a vein is encountered in the north cross-cut from tunnel 31 having a width of about fifteen feet, and about twenty-five feet in a northeasterly direction from there other vein material is encountered in tunnel 31, and a few inches of mineralization is found in the Rabbit discovery about twenty-five feet east, and a small vein in the north cross-cut from shaft 9 about twenty-five feet east of the Rabbit discovery. The only reason given by this witness for assuming that what is referred to as disconnected portions of one vein were at one time a continuous vein, is that he says that they are all alike in one respect, that is they have a northerly dip, except in shaft 21, and he assumes a northerly dip there. It appears, however, from the testimony of Mr. Williams for the defendants, that all of the veins explored in the eastern portion of Mineral application No. 888 dip to the north (T. 899) and from the testimony of Mr. Ray that south of the Donner vein is a north dipping vein which has a southwesterly and northeasterly strike and which if it extends on its strike sufficiently far in a northeasterly direction will cut the Donner vein and dislocate it (T. 949).

As to the so-called southerly vein, the chief witness for the defendants, Mr. Barker, made no claim that it could be traced in a westerly direction beyond its actual exploration in the Mullins tunnel (T. 958-959). The defendant, Mason, himself testified that the Mullins vein could not be traced west of the place where it was actually uncovered. Mr. Barker, as well as Messrs. Watson and Gage testified as to the absence of any vein in either tunnel 35 or 36.

All of the witnesses for the complainant testified positively as to the absence of any vein showing in tunnels 35 and 36 and shaft 19, and further that there was no possibility of determining the course of the vein shown in the north cross-cut from tunnel 31 beyond the distance where is it actually exposed or to determine its position if it exists at any point outside of the place where it is exposed by underground development, and that the same is also true of the vein exposed in the Mullins tunnel. Complainant's testimony is to the effect that what occurs in shafts 19 and 21 is a north and south fault. Whether one fault runs through both shafts or a different fault is exposed in each shaft, the witnesses ventured no opinion.

Defendants produced a sample (Defendants' Exhibit No. 96), taken from shaft 21. Complainant's witness, Wilson, pointed out the presence in such sample of rounded particles showing conclusively that it is fault material (T. 1152). Mr. Wilson having described shaft 19, testified concerning the material in

the bottom of the shaft as follows: "Crushed granite accompanying the fault movement was found in the bottom of that shaft in bed-rock. That is a plane of the continental fault. The material was clay, kaolin, resulting from the disintegration of the feldspar in the crushed granite and the various movement planes had about a north and south course and certain ones of those planes showed a considerable interior movement accompanied with slickensides along the clay material" (T. 1105).

Concerning the continental fault and the parallel fractures to the west of it this witness said: "There has been a great movement that had a width of probably two thousand feet and which had dropped this entire region an unknown distance from the top of the main range to the east of the camp" (T. 1105). Concerning shaft 21 this witness said: "That shaft has penetrated bed-rock after going through the wash to a possible depth of two or three feet and the west side of that shaft is a crushed granite clayey mass somewhat kaolinized. On the east side it was also a crushed granite which had apparent directions of running north and south with a dip of seventy-five to eighty degrees to the east and being undoubtedly in my opinion a plating of the continental fault" (T. 1117).

To the same effect is the testimony of Mr. Warner, Mr. Fisher, Mr. Linforth and Mr. Berrien.

Considering all of the development work prosecuted

on the Butte and Boston placer up to the time of the taking of the testimony and considering all of the statements of defendants' witnesses as true and interpreting them most favorably to the defendants, still no vein is shown within the ground in controversy in this case, west of shafts 21 and 19, and there is no proof, which may be considered as such indicating that if veins exist in those shafts, that they are veins or that either one of them is a vein which had been discovered on or prior to the date of the placer application. Giving consideration to all of the evidence, it is perfectly clear we submit that no vein has been shown to exist in either shafts 21 or 19 and that the existence of no vein has been shown within the ground in controversy.

FOURTH.

It already sufficiently appears from what has been heretofore said that there could be no description of the vein or veins supposed by the defendants to exist within the ground in controversy, for the reason that if they do exist there, it is not claimed that they know their position outside of shafts 21 and 19, and as to those shafts it is not claimed that a wall or any walls was exposed, so that if veins exist there, their position has not been definitely determined. There was no witness produced by the defendants who undertook to state the strike or position of any vein west of either shafts 21 or 19. Certain pencil lines were drawn on the map (Defendants' Exhibit No. 1), at the request of the

counsel for the defendants, but according to the testimony of Mr. Barker, who drew them, so far as he knew they meant nothing, but were simply drawn because counsel for the defendants requested it. Referring to such map it will be seen that the pencil line Y-V is roughly drawn so as to pass through shaft 21, and so also are the lines X-21 and Z-21. The line S-T is run near, or passes through the Gulf discovery shaft and shaft 19. There is not a word in the testimony indicating that any such lines had any significance whatever. Such testimony as relates to them is found on pages 951 to 959. The testimony concerning line X-21 and Z-21 is as follows: "Q. I wish that you would project a line upon this map of ours, Defendants' Exhibit 1, from shaft No. 21 to this red marking upon the map. A. That is the red marking on the west boundary of the Butte and Boston placer? Q. Yes, sir—run a line. A. (Witness draws line on map). Q. And for the accommodation of the other side, I wish you would likewise run a line from that point to this pencil mark 'C-1'. A. (Witness draws line on map)." (T. 951-952.)

Concerning the line S-T, the same witness testified as follows: "Q. When you speak of the line S-T, denoting the strike of the vein in answer to a question, you did not mean to so testify did you? A. I did not say anything about it being the strike of the vein. I was asked to project a line from the shaft 19 through the Hornet discovery; I did, and I marked it S-T." (Tr. 958.)

The two points marked "C" on the line representing the western boundary of the Butte and Boston placer were placed there by the witness Williams, and were intended to indicate his idea of the place where the Donner vein represented on the map, Defendants' Exhibit No. 115, would intersect the west boundary line of the Butte and Boston placer on the surface of the ground assuming that its strike was due east from the most easterly point where it was exposed by underground development and for a sufficient distance to intersect that line (T. 895; 904-906). Since the vein was not developed above the 660-foot level (that being the depth of bed-rock below the surface of the ground at that place and the highest point where the vein existed), it was necessary to project a line on the dip of the vein to the surface and to indicate the position of the vein on the surface and the correctness of such indicated position would, of course, depend upon the correctness of such projection and the correctness of the assumed dip of the vein below the 660-foot level, and that the portion of the vein which had once existed above the 660-foot level had the same dip as that portion of it which has been developed below that level. Two points are marked with the letter "C" on account of two different dips having been assumed for that portion of the vein above the 660-foot level.

One of the arguments of the defendants is that, having the strike of a vein for any distance, its strike is

presumed to continue the same for an indefinite distance beyond the place where the strike has been actually ascertained. In projecting the Donner vein they have said that the strike is east and west, and in undertaking to project the vein on its course beyond the place where it is exposed, have adopted that direction as the strike, but projecting the vein on such strike, they find that its apex on the Butte and Boston placer would extend several hundred feet south of shaft 21, which is the shaft with which they are endeavoring to connect it.

Another argument made by the defendants is that the line Y-21 represents the strike of the so-called northerly vein and projecting it westerly they get the line Y-V. The line so projected westerly, however, is about one thousand feet north of the Donner vein and their efforts in that way to connect with that vein fail. Enough has been said to show that all of the guessing which has been done by the defendants' witnesses as to the supposed course of either of such veins within the ground in controversy and such guessing as has been done by defendants' counsel and by him attributed to their witnesses, cannot be properly classed as evidence if that term is stretched to its greatest possible limits. If speculation were permitted instead of proof, sufficient data has not been supplied upon which a decree in favor of the defendants could be drawn.

When the counsel for the defendants (using the

witness Barker, to carry out his direction), drew the line V-Y and X-21 he failed to take into account either the difference of elevation of the ground or difference in the elevation of bed-rock between the point indicated as the easterly and westerly ends, respectively, of such lines. To illustrate by reference to Defendants' Exhibit No. 115, by descending from the eight hundred foot level to the 1300-foot level for a vertical distance of five hundred feet, the horizontal distance gained to the north is 220 feet, in other words a vertical line drawn through the vein at the 1300-foot would be 220 feet north of a vertical line drawn through the same vein at the eight hundred foot. If the vein were projected on its dip from the eight hundred foot level to the surface of the ground and a vertical line drawn through the projected course of such vein at the surface, such vertical line would be, of course, several hundred feet south of such vertical line drawn through the vein at the eight hundred foot level, and if the vein were projected upward on its dip so as to intersect a horizontal plane drawn through shaft 21 at the surface of bed-rock and a vertical line drawn through the vein where it intersected such plane, such line would be a still greater distance south. If counsel for the defendants is to be permitted to guess at the course of the vein as projected on its strike, it is evident that his guess must be incorrect, since he altogether failed to take into account the dif-

ference of elevation of bed-rock at shaft 21 and the most easterly development on the Donner vein.

The comment of the judge who tried the case as to the lack of testimony on this point on the part of the defendants is as follows:

> "Complying with a suggestion made during the course of the oral argument that the defendants furnish descriptions of the vein sufficiently definite to be incorporated into and give effect to a decree, descriptions together with diagrams illustrating the same have been furnished, but upon inspection they appear to be largely, if not wholly, arbitrary. It is, of course, a simple matter to prepare a description of a strip fifty feet in width extending across plaintiff's ground; from a point on the east to a point on the west, but what was desired was a description based upon and tied to the evidence. No references are made to the sources in the record from which these descriptions are derived, and I have been able to discover none. Upon the other hand, a reading of the evidence, in the light of the personal inspection of the premises made in company with and under and guidance of representatives of the litigants, confirms the plaintiff's contention that there is no substantial or rational basis upon which to rest such a description" (T. 43-44).

FIFTH.

We have already made reference to the absence of any proof showing a discovery of a vein in either the alleged Pleasant View or Point Pleasant locations, and we have also shown that there was no discovery of any vein within the Butte and Boston placer at any time prior to the date of the placer application. Lacking evidence of the discovery of a vein, there is, of course, no proof of either the making of the Point Pleasant or Pleasant View locations. If the existence of such discoveries were assumed the evidence is, however, in a number of other respects insufficient. There was no proof that the corners were sufficiently marked by monuments, except by hearsay testimony. As to the Point Pleasant claim there is no attempt by competent proof to show its position on the ground. A proper objection was made to such incompetent proof as was offered. The production of the certified copy of the recorded declaratory statement of such locations is only evidence of the fact of the record of such statement and such facts as by law are required to be stated in it, which are the names of the locators, the date of the location and such a description of the claim by reference to natural objects or permanent monuments as will identify it. It was necessary, in addition, to show with reference to each of such claims the discovery of a vein within their boundaries and that the location was definitely marked on the ground so that the boundaries could be readily traced.

The witness Barker, in explaining the map (Defendants' Exhibit No. 1), stated that the boundaries of the Point Pleasant claim were not put on the map from any survey made by any witness who testified, but that such boundaries were taken from a map that was introduced in evidence in some case in the District Court (T. 63). The witness also said that such surveys as were made and represented on the map were made by Mr. Pennington and that Mr. Pennington's survey did not include the boundaries of the Point Pleasant claim (T. 63). The boundaries of Point Pleasant claim, as represented on the map, appear to have been based on a survey made by T. T. Baker, who did not testify. Mr. Pennington, himself, testified that he knew nothing concerning the corners of the Point Pleasant claim, and it further appeared that all of the corners of the claim, the location of which were represented on the map, were based upon statements made to him by other persons, which other persons were not called as witnesses (T. 66), or if called, could not testify as to such matters from their own knowledge. Some of the corners of the claims represented on the map could be identified at the time he made the survey, but he could not tell at the time he gave his testimony which corners could be so identified (T. 63). There was no testimony offered by any witness, who claimed to know of his own knowledge, the position of any of the corners or of the discoveries. Mr. Mason's statement is as follows: "Mr. Pass-

more took me to the corners and showed me where they were. He is the man that put the corners up. That was the source of my opinion."

Complainant's Exhibit No. 14 has represented on it what purports to be the boundaries of the Pleasant View claim. Mr. Berrien, who prepared the map, testified that he knew nothing concerning such boundaries and he did not undertake to testify that they were correctly represented on such map (T. 1441).

But if a valid location of the Point Pleasant and Pleasant View claims had been shown by competent proof, it is quite clear from the testimony that they were abandoned prior to the date of the issuance of patent. Mr. Mason testified that there was certain litigation, that such litigation was settled by a compromise and that by such settlement and compromise the witness and his partners received ten acres of the upper portion of the ground known as the Butte and Boston placer (T. 1074-1075). 1895 or 1896 was fixed as the date of such settlement (T. 1099). In another place the witness stated that the adverse suit had been disposed of by compromise in 1895. Mr. Mullins states that the litigation which was compromised was the suit to determine the right of possession brought against the placer applicants by the quartz claimants, who had adversed such application (T. 475). Such compromise was prior to the issuance of the placer patent, for as stated in another place, it was by virtue of such compromise that judg-

ment was rendered in favor of the defendants, the placer applicants, who thereupon proceeded to patent.

It is clear from the testimony that there is no proof of any valid location of either the Point Pleasant or Pleasant View claims or definitely what territory was embraced within such claims. It does affirmatively appear, however, that such attempted locations were abandoned prior to the date of the issuance of the placer patent.

In the foregoing discussion of the evidence no reference has been made to the so-called surrebuttal testimony (T. 1594-1671), or to the testimony of complainant in reply (T. 1673-1689), such so-called surrebuttal testimony having been taken after the time allowed for the taking of testimony had expired, and no order having been made allowing the taking of such testimony, complainant objected to its introduction and at the conclusion of the same, moved to strike it out (T. 1671-1673), and the complainant offered testimony in reply only in the event of such motion being overruled. Should such testimony be considered, it will be sufficient to say concerning it, that so far as it is material, it tends to sustain the various contentions of the complainant.

The Law.

The appellee relies upon the following legal propositions:

I. A PLACER PATENT CONVEYS TO THE PATENTEE EVERYTHING WITHIN VERTICAL PLANES DRAWN DOWNWARD THROUGH THE SURFACE BOUNDARIES, EXCEPT (a) VEINS, THE TOPS OR APICES OF WHICH ARE WITHIN THE PLACER LIMITS AND WHICH WERE KNOWN TO EXIST AT OR PRIOR TO THE DATE OF THE APPLICATION FOR PLACER PATENT AND WERE NOT INCLUDED IN SUCH APPLICATION, AND (b) SUCH SEGMENTS OF VEINS, THE TOPS OR APICES OF WHICH ARE OUTSIDE OF THE PLACER SURFACE BOUNDARIES BUT WHICH UNDERLIE THE PLACER SURFACE.

II. THE EXTENT OF THE SURFACE AREA WHICH MAY BE EMBRACED IN A LODE CLAIM WITHIN GROUND PATENTED AS PLACER GROUND DOES NOT EXCEED 25 FEET ON EACH SIDE OF THE VEIN.

III. IF GROUND EMBRACED WITHIN A PLACER APPLICATION FOR A PATENT BE COVERED EITHER WHOLLY OR PARTLY BY A QUARTZ LODE LOCATION MADE PRIOR TO THE PLACER LOCATION, AND THE LODE

CLAIMANT FAILS TO ADVERSE THE PLACER APPLICATION, AND SUCH LODE CLAIM BE VALID AND EXISTING AT THE DATE OF THE ISSUANCE OF PLACER PATENT, THE GREATEST EXTENT OF SURFACE GROUND AS TO WHICH THE PLACER PATENT MAY BE HELD TO BE INVALID BY REASON OF SUCH PRIOR LODE LOCATION DOES NOT EXCEED 25 FEET ON EACH SIDE OF THE VEIN LOCATED AND COVERED BY SUCH LODE LOCATION.

IV. THE PLACER PATENT IS PRIMA FACIA EVIDENCE OF TITLE IN THE PLACER PATENTEE, NOT ONLY OF THE SURFACE GROUND INCLUDED THEREIN, BUT ALSO OF ALL ORES AND MINERALS WHICH LAY BENEATH SUCH SURFACE, AND THE BURDEN IS UPON ANY ONE CLAIMING THAT A VEIN OR LODE WAS BY VIRTUE OF ITS BEING KNOWN TO EXIST AT OR PRIOR TO THE DATE OF PLACER APPLICATION AND ON THAT ACCOUNT EXCEPTED FROM THE PLACER PATENT TO SHOW THAT SUCH VEIN WAS IN FACT KNOWN TO EXIST.

V. IN ORDER TO PROVE THAT A VEIN WAS KNOWN TO EXIST WITHIN THE MEANING OF THE TERM AS USED IN SECTION 2333 OF THE REVISED STATUTES OF THE UNITED STATES, IT IS NECESSARY TO PROVE,

FIRST, THAT WHAT WAS CLAIMED AS A VEIN HAD DEFINITE BOUNDARIES AND THAT SUCH VEIN WAS AT THE DATE OF SUCH PLACER APPLICATION FOR PATENT DEFINITELY ASCERTAINED; SECOND, THAT SUCH VEIN WAS UNDER CONDITIONS THEN EXISTING OF SUFFICIENT VALUE TO JUSTIFY EXPLOITATION AND DEVELOPMENT FOR THE PURPOSE OF EXTRACTING MINERAL TO BE FOUND IN IT.

VI. THE BURDEN IS ALSO UPON ANY ONE MAKING A CLAIM TO GROUND BY VIRTUE OF A LODE LOCATION UPON A VEIN CLAIMED TO HAVE BEEN SO EXCEPTED FROM A PLACER PATENT TO FURNISH A DESCRIPTION OF THE VEIN AND OF THE AREA OF ENCLOSING SURFACE GROUND SUFFICIENT TO PERMIT THE DRAWING OF A DECREE IN HIS FAVOR, AND THE BURDEN IS ALSO UPON ANY ONE ATTEMPTING TO SHOW THE INVALIDITY EITHER WHOLLY OR PARTLY OF A PLACER PATENT BY REASON OF A PRIOR LODE LOCATION WHICH WAS VALID AND EXISTING AT THE DATE OF THE PLACER PATENT TO NOT ONLY SHOW THE FACT OF THE MAKING OF SUCH PRIOR QUARTZ LODE LOCATION BUT THAT THE SAME WAS VALID AND EXISTING AT THE DATE OF SUCH PLACER PATENT AND TO

FURNISH ALSO A DESCRIPTION OF THE AREA AS TO WHICH THE INVALIDITY OF THE PATENT EXTENDS, WHICH IN A CASE WHERE THERE HAS BEEN NO ADVERSE OF THE PLACER APPLICATION DOES NOT EXCEED THE VEIN COVERED BY SUCH PRIOR LODE LOCATION AND 25 FEET ON EACH SIDE.

VII. IN ALL SUCH CASES THE BURDEN OF PROOF MAY NOT BE DISCHARGED BY SLIGHT EVIDENCE BUT CLEAR AND CONVINCING PROOF IS REQUIRED.

VIII. THE PRODUCTION OF A RECORDED CERTIFICATE OF LOCATION OF A LODE CLAIM IS ONLY EVIDENCE OF THAT WHICH BY LAW IS REQUIRED TO BE STATED IN SUCH CERTIFICATE OF LOCATION, WHICH UNDER THE LAWS IN FORCE IN MONTANA ON APRIL 1st, 1890, ARE THE FACT OF THE RECORDING OF SUCH CERTIFICATE, THE NAMES OF THE LOCATORS, THE DATE OF THE LOCATION AND SUCH A DESCRIPTION OF THE CLAIM BY REFERENCE TO SOME NATURAL OBJECT OR PERMANENT MONUMENT AS WILL IDENTIFY IT.

IX. IN ORDER TO SHOW A VALID LOCATION IT IS NECESSARY TO PROVE IN ADDITION TO THE FACTS ENUMERATED IN THE PREVIOUS PARAGRAPH, FIRST, THAT THERE

WAS A VALID DISCOVERY, AND SECOND, THAT THE LOCATION WAS DISTINCTLY MARKED ON THE GROUND BY MONUMENTS SO THAT ITS BOUNDARIES COULD BE READILY TRACED.

X. ABANDONMENT OF A LODE LOCATION MAY BE INFERRED FROM ACTS INCONSISTENT WITH AN INTENTION TO RETAIN THE CLAIM.

XI. UNDER THE LAWS IN FORCE AT THE TIME OF THE HEARING OF THIS CASE AND AT THE TIME OF THE TAKING OF THE TESTIMONY IN IT, TESTIMONY TAKEN AFTER THE EXPIRATION OF THE TIME ALLOWED BY LAW FOR THE TAKING OF THE TESTIMONY SHOULD NOT UNLESS SUCH TIME HAS BEEN EXTENDED BY THE COURT BE RECEIVED OR CONSIDERED.

XII. THE ISSUANCE OF A PLACER PATENT CONCLUSIVELY DETERMINES THAT THE GROUND COVERED BY SUCH PATENT IS IN FACT PLACER GROUND.

XIII. IN A CASE LIKE THE ONE AT BAR, EVIDENCE TO THE EFFECT THAT THE GROUND IN CONTROVERSY DID NOT CONTAIN PLACER GOLD OR HAD NEVER BEEN WORKED AS PLACER GROUND IS INADMISSIBLE.

XIV. A VEIN CAN ONLY BE SAID TO BE

KNOWN TO EXIST WHERE IT IS ACTUALLY EXPLORED. IF EXPLORED FOR A CERTAIN DISTANCE THERE IS NO PRESUMPTION THAT IT CONTINUES BEYOND THE PLACE OF SUCH ACTUAL EXPLORATION.

1.

The character of the title acquired by a placer patentee is to be determined by the provisions of Sec. 2333 of the Revised Statutes of the United States, which are as follows:

> "Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not in-

> clude an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The express language of the statute is that where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries. Concerning this point Mr. Lindley in the valuable second edition of his works on mines, Section 781, says:

> "We may conclude, that a placer patent conveys to the patentee everything within vertical planes drawn downward through the surface boundaries, except (1) such lodes, or veins, whose tops or apices, are within the placer limits, whose existence was known prior to the filing of the application for placer patent, and were not included in the placer application; (2) such segments of veins having their tops, or apices, elsewhere, as may underlie the placer surface and which may lawfully be taken by the apex lode locator under a regular valid lode location, pursuing his vein on its downward course."

See also Sullivan v. Mining Co., 143 U. S. 431.

II.

By referring again to Sec. 2333 R. S. U. S. it will be seen first, that it is only by virtue of the known existence of a vein or lode within the ground covered by the placer application that anything is reserved or excepted; and second, that which under any circumstances is reserved or excepted is the vein or lode claim.

The placer applicant may include in his application an application for patent also upon the vein or lode claim. If he follows that course the extent of surface area which may be included within such vein or lode claim does not exceed 25 feet on each side of the vein or lode claimed. If we suppose the existence of a known lode definitely ascertained wholly within a placer claim, the applicant for patent might expressly exclude such area of surface ground in his application for patent. If he did so, it could hardly be contended that some other person might in a lode location upon such known vein embrace a greater area than that which was expressly excepted. If the applicant for patent does not expressly except the lode or vein with such area of enclosing surface ground, it cannot, we submit, be held that a greater area is reserved than that which would have been reserved by such express exception or than that which could have been embraced in such lode claim within the placer ground if an application had been made for patent upon such lode claim, and of course, it is only

that which is reserved and excepted from the placer patent by failure to include in such application an application for the vein or lode which is reserved, the title as to which remains in the government and which may be afterward located as a lode claim.

So far as we know the question has not been passed on by the Supreme Court of the United States or any of the Circuit Courts of Appeal. The ruling of the Land Office and the decisions of the State courts are all in harmony however.

Upon this point the Supreme Court of Colorado in

> Mt. Rosa Mining, Milling & Land Co. v. Palmer, 26 Colo. 56; 56 Pac. 176

after analyzing the provisions of Sec. 2333 said:

> "We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing, and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section, is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take twenty-five feet on each side of the center of the vein, and pay therefor at the rate of five dollars per acre. This is a privilege accorded to him, which he may avail himself of, or not, as he sees fit. If he elects to

waive this privilege, he may do so in one of two ways—either by expressly excepting the lode from his placer location and application for patent, or remaining silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode and by such silence is bound to the same extent, and in the same manner, but no further, that he would have been by an express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming for placer purposes, the greatest possible area within the boundaries of his placer claim, and should be held to have relinquished only that which he might have taken, which is the lode, with the amount of surface ground provided."

In the case of

Noyes v. Clifford, 94 Pac. 842,

counsel for both plaintiff and defendant assumed that the extent of surface ground which could be located as a lode location within ground patented as placer was twenty-five feet on each side of the middle or center of the vein. With reference to this point the Supreme Court of Montana in the course of the opinion said:

"If the lode or vein was excepted by the terms of the patent, it, together with twenty-five feet on either side of it was open to exploitation and location by any citizen of the United States."

In

Washoe Copper Co. v. Junilla, 115 Pac. 917

the same assumption as to the law was made by counsel for the respective parties. In that case the Supreme Court of Montana in passing upon the admissibility in evidence of a certified copy of the declaratory statement of location of the Morning Star claim which had been offered as a declaration against interest, said that such declaratory statement should have been excluded because it appeared that the locator, one Charles Colbert, had parted with his interest in the placer title before the making of the lode location and that the effect of the admission of such declaratory statement would be to admit the declaration on the part of Colbert to the effect that the placer title which he had sold and conveyed was imperfect to the extent of the surface area which could be embraced in a lode claim within the limits of such placer claim, which the court states is twenty-five feet on each side of the vein. Upon this point the language of the court was:

> "The effect of this declaration, if true, is to prove that the extent of his placer claim is less than it purports to be; and, having conveyed away all that his placer purports to have been, the direct effect of this declaration is to destroy the title to that portion of the placer crossed by the vein, and a strip of 25 feet on either side thereof."

The United States Circuit Court for the District of Montana (Judge Hunt preseding) in the case of

South Butte Mining Co. v. Butte & Veronica Copper Mining Co.

decided to the same effect, a certified copy of a portion of the opinion on rehearing being annexed hereto.

A ruling has been made by the Secretary of Interior to the effect that the extent of surface ground which may be located by a lode claimant within ground patented as placer is twenty-five feet on each side of the middle or center of the vein and such rule has been in force in the Land Department for a number of years.

In

1 Lindley on Mines, (second edition) 756,

the learned author after referring to such ruling by the Secretary of Interior and decision of the Supreme Court of Colorado says:

> "With this consensus of opinion by the courts and the Land Department the rule may be considered as practically settled."

The same rule is stated in

27 Cyc. 616.

III.

Contention is made by the appellants that the patent for the Butte and Boston placer is invalid to the extent of the whole area in conflict between such placer and the so-called Point Pleasant and Pleasant View Lode locations. This contention is entirely aside from the contention made by the appellants as to veins known to exist at the date of the placer application.

R. S. U. S., Sec. 2325

after stating in detail the steps prior to the completion of publication necessary to be taken in order to procure patent for land claimed and located for valuable deposits continues as follows:

> "At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

R. S. U. S., Sec. 2329

is as follows:

> "Claims usually called 'placers,' including all forms of deposit, excepting veins of

quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

For the sake of argument we will, for the present, assume that there is competent proof of the location of such lode claims and that they were valid and existing claims at the date of the issuance of such patent, and that there is competent proof on the part of the appellants showing definitely what area was so in conflict.

Proceeding with these assumptions in mind, the appellants are confronted with the provisions of said Sections 2325 and 2329. According to the evidence in the case the application of Simeon V. Kemper and Josephine Lorenz was adversed by Louis Mason and others who claimed to be the owners of the so-called Point Pleasant and Pleasant View locations and who claimed a superior right to the ground on account of priority of location. If their locations were in fact prior that was a sufficient ground upon which to file such an adverse claim, and in fact the only way that such rights as they may have had by reason of priority of location could be preserved. Admitting for the sake of argument that such locations were in fact prior and keeping in mind that we have already assumed

that they were valid and existing at the date of the issuance of patent, the appellants are undoubtedly right in their contention that the land embraced in such lode locations was withdrawn from entry and was not subject to disposal or sale by the government, and that the patent issued to the placer applicants was invalid insofar as it embraced land which was at the time covered by such lode locations, unless for some reason the rights of the lode claims are barred, but according to the evidence, the lode claimants had in fact filed an adverse claim to the placer application and then had filed two suits to determine the right of possession as to the areas in conflict, and such suits by reason of an agreement, proceeded to judgment in favor of the placer applicants, who thereupon procured a patent, and then in order to carry out such agreement deeded to the lode claimants one-third of the ground embraced in such placer application. Under such circumstances, if the appellant Mason had continued to represent every year the Point Pleasant and Pleasant View claims, would he be allowed to assert any claim to any part of the land embraced in such placer application by reason of such lode locations, or would the court say that the effect of the agreement by which he allowed judgment to be taken against him in the adverse suits was to withdraw the adverse claim or adverse claims which he had filed to the placer application and that he was then in the same position that he would have been if he had filed no adverse, and that an in-

disputable presumption had arisen that no conflicting claims existed to the premises described in the placer application? If, under the circumstances assumed such claims on the part of the appellant Mason would be held to be barred, are the other appellants in any better position? We have assumed for the sake of argument that the appellant Mason is able to connect himself with the title which was held under such lode locations. The other appellants do not attempt to connect themselves in any way with such title. Are they in any more favorable position and would they be allowed to say (in a collateral attack upon the patent, which this is), on that account that the patent so far as it covered such area in conflict was invalid? It is the appellee's contention that whatever rights the lode claimants may have had by reason of priority of location were lost by the withdrawal of the adverse claims and the issuance of patent in favor of the placer claimants and that no third party will be heard to say that the placer patent was invalid on account of any supposed prior lode locations. We say that that is the necessary effect of the provisions of said Section 2326.

The case of

Lavagino v. Uhlig, 198 U. S. 443

was an action to quiet title to conflicting lode locations. The parties on one side asserted title by virtue of the Levi P. lode location and the parties on the other side asserted title by virtue of the Uhlig No. 1 and the

Uhlig No. 2 lode locations. The decision of the case turned upon the construction to be given to the provisions quoted from Sec. 2326. In passing upon this point Mr. Chief Justice White (then Mr. Justice White) said:

> "This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice, and performed the other acts made necessary to entitle him to a patent, and who makes application for a patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section, thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to inure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse.
>
> "It cannot be denied that under Sec. 2326, if, before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adversed the application, upon an establishment of a prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. Gwillim v. Donnellan, 115 U. S. 45, 51, 29 L. Ed. 348, 350, 5 Sup. Ct. Rep. 1110. And the same result would have arisen had the owner of the

Levi P. adversed the application for a patent based upon the Uhlig locations, and failed to prosecute, and waived such adverse claim.

"In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location, and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver, if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete."

To the same effect is

Farrell v. Lockhart, 210 U. S. 142.

In view of the provisions of said Sec. 2326 and giving effect to these decisions upon what theory can it be contended that the appellants, under the circumstances assumed, should be permitted to show the existence of prior locations and the invalidity on that account of the placer patent? Answering this question we will say that in our judgment the only possible theory is suggested in the case of

Dahl v. Raunheim, 132 U. S. 264; 33 L. Ed. 325 which was an action to quiet title to certain ground, the plaintiff asserting title by reason of the issuance of a Receiver's receipt in patent proceedings based upon a placer location, and the defendant asserting title by reason of an attempted lode location covering a portion of the same ground, the lode location having been made subsequent to the date of the placer application, and there having been no adverse claim filed by such lode claimant. It was held that the lode claimant having failed to adverse the placer application was precluded from questioning the right of the plaintiff to a patent, and that the only question open to him was whether the lode or vein claimed by him was known to exist at the date of the placer application. In the course of the opinion the court said:

> "The plaintiff applied for a patent for its placer ground in November, 1880, and notice of the application was published by the register of the local land office, and all other provisions of the statute required in such cases were complied with. No adverse claim was filed by the defendant or anyone else during the period of publication. The Dahl lode claim was not located until after that period had expired. The defendant is therefore precluded from questioning the right of the plaintiff to a patent for the premises, and, of course, from objecting either to the location or its character as placer ground. The only question open to him in this controversy is whether the lode or vein claimed by him was known to exist at the date of the plaintiff's application."

In order to show that there is not an indisputable presumption to the effect that there were no conflicting claims as against the placer applicant, it is necessary to show the existence of a known vein that was of sufficient value to justify exploitation and definitely ascertained at the date of the placer application and such vein with an area of surface ground on each side not exceeding 25 feet must be definitely described, for it is only by such showing that an area may be shown to have been reserved from the placer application. If not so reserved Sec. 2325 applies and in the absence of an adverse claim all prior claims are barred. If the appellants therefore rest their claim on an attempt to show the existence of prior lode locations at the date of the issuance of patent, they cannot thereby avoid the necessity of making proof of all of the facts which it is necessary that they should make if their case was rested instead on the claim of a vein or veins known to exist at the date of the placer application.

There is nothing in the case of Noyes v. Mantle, 127 U. S. 348, to support the appellants' contention. It appears from the opinion in that case that it was found by the trial court that the vein attempted to be located as the Pay Streak lode was known to exist by the placer applicant at the date of his application for patent, and it may have been that there was evidence in the case and the court may have found that the vein was definitely ascertained at the date of the placer application and then of sufficient value to justify exploita-

tion, and it may be that the vein with an area of enclosing surface ground was definitely described, and that such area did not exceed twenty-five feet on each side of the vein. There is nothing, whatever, in the opinion which indicates any different state of facts. If so, then the vein with such enclosing surface area was reserved by the said Sec. 2333 and being so reserved the lode claimant was not barred on account of his failure to adverse the placer application.

IV.

From Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co., 143 U. S. 394, we quote the following:

> "The plaintiff to maintain its case offered in evidence simply its patent and other matters of record together with parol proof of the boundaries. After the introduction of this testimony the plaintiff rested, and by it a prima facia title to the whole placer claim was established."

The same rule was stated in

> Migeon v. Montana Central Railway Company, 68 Fed. 811,

and the decision in that case was affirmed by this court in

> Montana Central Railway Company v. Migeon, 77 Fed. 249,

and the rule by it reasserted in

Thomas v. South Butte Mining Co. (not yet reported).

The rule as stated in the Migeon case was followed by the Supreme Court of Montana in the case of

Casey v. Thieviege, 19 Mont. 342; 48 Pac. 394.

The rule was stated in

Cripple Creek Mining Company v. Mount Rosa Mining Company, 26 L. D. 622,

in the following language:

"The placer claimant has a government patent for the land in controversy, *obtained upon a showing held by the land department to establish the placer character thereof*, and the lode claimant has attacked that patent, alleging that this land contained, when the patent was applied for, a known vein or lode, and was therefore excepted from the operation of the patent. *This allegation amounts to nothing if not sustained by proof.* The placer patentee is certainly not called upon *to support the title apparently conferred by the patent,* simply because it is assailed by someone who finds therein an obstacle to obtaining title to the same ground. It was, therefore, incumbent upon the lode claimant to establish the truth of its allegations *and the burden of proof then was rightly placed upon it.*"

In the dissenting opinion in

> Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co., supra,

Mr. Justice Field, concerning this point, said:

> "The presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has been frequently held by this court that if, under any circumstances in the case, the patent might have been rightfully issued, it will be presumed, as against any collateral attack, that such circumstances existed."

The presumption in favor of the placer patentee until the existence of a known vein is established by proof is the same as the presumption in favor of the lode patentee. As to the presumption in favor of the owner of a lode claim, see the following:

> Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U. S. 196;
>
> Doe v. Waterloo Mining Co., 54 Fed. 935;
>
> Parrott Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 Pac. 326;
>
> State, ex. rel. A. C. M. Co. v. District Court, 25 Mont. 304;
>
> Maloney v. King, 30 Mont. 159.

As the placer patent is prima facia evidence of title in the placer patentee of everything beneath the sur-

face of the ground covered by such patent it necessarily follows that the burden is on one claiming a portion of such ground on account of the existence of a known vein to establish by proof the fact of the existence of such known vein.

V.

Congress in adopting the said Sec. 2333 did not undertake to define the term "vein." Sec. 2333 states, however, that the vein or lode referred to is such as is described in Sec. 2320. A mineral deposit, in order to constitute such a vein according to the decisions of the courts must have definite boundaries and be of sufficient value to justify exploitation.

In the

Eureka case, 4 Sawyer 302, Fed. case No. 4548,

Justice Field defined a lead as follows:

> "To determine whether a lode or vein exists, it is necessary to define those terms, and as to that it is enough to say that a lode or vein is a body of mineral or mineral-bearing rock *within defined boundaries*, in the general mass of the mountain. * * * * A continuous body of mineral or mineral-bearing rock extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formations; but if it is not continuous or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it

lacks the individuality and extension which is an essential quality of a lode or vein."

In

Iron Silver Min. Co. v. Mike & Starr Min. Co., 143 U. S. 494, 36 L. Ed. 211,

Mr. Justice Field said:

"As stated above, there can be no location of a lead or vein until the discovery of precious metals in it has been had, and then it is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent on ground embracing it, but those only which possess these metals in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development."

And in another portion of the opinion it was said:

"But as I shall show hereafter, the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify the expenditure of money for the development of the mine and the extraction of the mineral."

In

Iron Silver Min. Co. v. Chesman, 116 U. S. 529,

Mr. Justice Miller said:

"A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute in his (the miner's) eyes a lode."

The United States Circuit Court of Appeals for the Eighth Circuit, in the case of

> San Francisco Chemical Co. v. Duffield, 201 Fed. 830,

and this court in the case of

> Duffield v. San Francisco Chemical Co., 205 Fed. 480,

have given practically the same definitions.

Before a mineral deposit which answers to the definition of a vein can be held to have been known to exist within the limits of ground for which an application for placer patent had been made, it must be definitely ascertained, and the existence of the values which would justify exploitation must be known. The law was declared by this court in

> Migeon v. Montana Central Ry. Co., supra,

in the following language:

> "If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying $5 an acre for that portion of the ground, and $2.50 an acre for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession, by virtue of his patent for the placer ground, to the vein or lode. It matters not whether there is a

lode or vein actually within the limits, which subsequent developments may prove, if it is not known to exist at the time of the application the patent for the placer claims will include such lode or vein. In such cases the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals to justify their designation as "known veins or lodes"; that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable and on that account, and justify their exploitation."

The language of the Supreme Court in

United States v. Iron & Silver Mining Company, 128 U. S. 674,

"To get that designation the lodes or veins must be clearly ascertained."

Mr. Justice Field in

Sullivan v. Iron Silver Mining Company, 143 U. S. 431, 36 L. Ed. 214

in defining a vein known to exist said:

"Before a vein or lode may be deemed to fall within those excepted from the placer patent as a known lode existing at the time of the application of the patentees, the lode must be discovered and located so far as to be capable of measurement."

And in

Iron Silver Min. Co. v. Mike & Starr Co., supra, in discussing this point, said:

> "And to embrace the lode within the patent of a placer claim the applicant must, if it be known, pay for it at the rate of five dollars per acre. But he cannot pay any sum, or offer to pay so as to be effectual, until he can ascertain the number of acres contained in the lode claim desired, that is, until the ground can be measured. Nor could the officers of the land department accept any sum from the applicant until such measurement, upon a mere speculative opinion as to the extent of the supposed lode."

And in another part of the opinion he said:

> "In such cases (referring to the case of an application for patent on a placer claim within which was a known lode) if the lode claim is known to the applicant to exist he must designate it in his application, but it cannot, of course, be known to him to exist, whatever his conjectures may be, until the lode is discovered and located so as to enable him to state its existence and extent in his application for a patent for the placer claim and to tender the price per acre required. If there be any variance between these views and those expressed in Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, as to the manner in which knowledge of the existence of a lode within the boundaries of a placer claim may be obtained, it is because of a more careful consideration of the subject in later years than formerly and of larger experience in mining cases."

In

Noyes v. Clifford, 37 Mont. 138,

the Supreme Court of Montana said:

> "The burden is cast upon the adverse claimant to show, not only that the vein or lode upon which he founds his claim falls within the recognized definitions of these terms, but also that it was known to exist as a clearly ascertained vein, and sufficient in extent to render the land more valuable because of it, and to justify its exploitation in order to extract and utilize its contents."

From the authorities quoted above, it is clear that what is meant when it is said that a vein must be definitely ascertained at the date of the placer application before it can be held to answer to the designation of a vein known to exist is not only that the fact that a vein exists is definitely ascertained, but that the boundaries of the vein must be so ascertained. Until the boundaries of the vein are determined, the area of enclosing surface ground which is excepted by reason of the known existence of the vein, cannot be determined, since such area of enclosing surface ground does not exceed twenty-five feet on each side of the vein. Until such area of such surface ground can be determined it cannot be reserved or excepted from the patent. The applicant for placer patent may, by express declaration, except it to the extent that it may be measured, but to no greater extent, and for the same reason such area is by implication, on account of the

failure of the applicant to include in his application an application for patent of the vein or lode claim, excepted to the same extent, but to no greater extent.

Counsel for the appellants are evidently of the opinion that if at the time of the making of an application for patent on a placer claim a lode within the boundaries of such ground has been uncovered and is disclosed for any distance along its length, but is entirely covered and unexplored and unknown through the remainder of its length, that the whole vein through its entire extent, so far as it is embraced within the placer claim, is reserved and excluded from the patent of the placer claim by the failure of the applicant for patent to make application for patent also upon the lode claim. We submit that there is no support for such contention in any of the decided cases.

The case of Reynolds v. Iron Silver Mining Company, 116 U. S. 687, and Iron Silver Mining Co. v. Reynolds, 124 U. S. 374, was an action of ejectment brought by the plaintiff, the Iron Silver Mining Company against Reynolds and another, in a court in Colorado. The plaintiff's claim of title was based upon a placer patent to the ground in controversy, was controverted by the defendants on the theory that at the time of the application for patent for such placer ground there was within such ground a vein or lode known to exist, and that the same was on that account reserved and excepted from the placer patent. The case was tried to a jury, which was instructed by the

court to return a verdict for the plaintiff. The case having been brought by a writ of error into the Supreme Court, the error assigned was an instruction to the jury to the effect that title on the part of the plaintiff was not essential to a recovery, since the defendants showed no title in themselves. This assignment of error was sustained and the judgment of the lower court was reversed. No other question arose in the case, though in the course of the opinion it was said that Congress meant that lodes and veins known to exist when the placer patent was asked for should be excluded from the grant as much as if they were described in clear terms in the patent. This statement of the court referred entirely to the description of such vein in the patent, and had no reference to the question of whether a vein could be held to be excepted beyond the extent to which it was definitely ascertained and capable of measurement at the time of the placer application. The case having been sent back to the lower court for a new trial, a second trial was had to a jury and the plaintiff offered in evidence in addition to the placer patent, evidence of a lode location covering the lode claimed on the previous trial by the defendant to have been excepted by the placer patent, but such evidence was rejected, and the single question then to be tried being the question of the knowledge on the part of the plaintiff of the existence of the lode in question at the time of the placer application, evidence was offered by the defendant and

admitted by the court as to the belief of the plaintiff as to the existence of a lode, and upon the submission of the case to the jury they were instructed that it was unnecessary to state what circumstances might be sufficient to charge a patentee with knowledge as declared by the statute, for if in any case it appeared that an application for a patent was made with intent to acquire title to a lode or vein which might exist in the ground beneath the surface of a placer claim, a patent issued upon such application could not operate to convey such lode or vein.

The case having been brought again to the Supreme Court it was held that in the rejection of such testimony offered by the plaintiff, and in the admission of such testimony by the defendant as well as in the instruction given to the jury, that the court erred and the judgment of the lower court was again reversed.

In Noyes v. Mantle, supra, the question determined was as to the knowledge of the placer applicant of the existence of a vein or lode within the ground covered by the placer application, such vein or lode having been located prior to the date of the placer location, and the location being afterwards kept alive by annual representation work. It was held that the recording of the declaratory statement of location was sufficient to charge the placer applicant with knowledge of the existence of the lode claim.

There was no question in that case as to whether or not the vein in question was definitely ascertained at the time of the placer application.

In Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, the vein which was in controversy was what is known as a blanket vein, being a horizontal deposit. It does not appear from the opinion the extent of the development upon such blanket vein at the time of the placer application, but, of course, there could be no question in the case as to the area of surface ground enclosing such vein, for the reason that the ground which enclosed it was above it and below it, and not on either side in a horizontal direction. In the majority opinion of the court there is no discussion of any question concerning the sufficiency of the determination of such vein at the time of the placer application. The questions decided in the majority opinion of the court were, first, whether the verdict of the jury should be disturbed on the ground that the evidence was insufficient to show that the vein was one which would have justified exploitation and development at the time of the placer application; second, whether a vein could be held to be known within the meaning of the statute unless it had been covered by a quartz lode location at or prior to the date of the placer application; and third, whether error in the instructions to the jury as to the time when such vein must be known to exist in order to be excepted from the placer patent was prejudicial error.

VI.

It is evident that since the production of the patent is prima facia evidence of title in the placer patentee as to everything embraced within the area covered by such patent that it is incumbent on any person undertaking to claim a part of that which is covered by such patent, either by reason of the existence of a known vein at the date of the placer application or by reason of a prior lode location to furnish a description of the vein with twenty-five feet of surface ground on each side of it. In the case of South Butte Mining Co. v. Butte & Veronica Copper Mining Co., supra, a decree was rendered in favor of the defendants which purported to give to them an area of ground covered by an attempted lode location but which was not limited to twenty-five feet on each side of the vein. The decree was held to be erroneous for that reason and set aside on petition for rehearing. A portion of the opinion on rehearing is as follows:

> "The decree in this case is erroneous, and is hereby ordered set aside and vacated.
>
> "I still think, however, that the defendants must prevail generally, but the extent to which their rights should be upheld must be limited. Under Sec. 2333 R. S. U. S. they can only take a decree for the lode referred to in the memorandum opinion as having a southeast, northwest strike and a southerly dip, and which was well known to exist prior to Oct. 21, 1881; and for twenty-five feet of surface on each side thereof.

"But to define the lode with satisfactory precision is, I think, impossible under the evidence; and as the surface to belong to the defendants can only be described after the lode is defined, it becomes equally impossible to define the surface area with accuracy.

"The burden of proving the right to the lode having been put upon defendants as lode claimants, it is still upon them to prove the size or extent and strike of their lode with a definiteness sufficient to enable the court to describe the lode in order to define the surface, for it is only the lode, and 25 feet of surface on each side of the lode that they are entitled to."

VII.

The importance of the stability of titles based upon patents from the government is a sufficient reason for the rule which does not permit such patents to be set aside or their effect defeated by claiming land upon the plea that it was reserved, except upon clear and convincing testimony.

We submit as very pertinent here the language of Mr. Justice Field in

Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., supra,

as follows:

"As the lode claim of the defendant in this case embraces a little over ten acres, it is difficult to believe that the applicant for a placer claim embracing it, if it was known to exist at that time,

would have neglected to apply for it when it could have been obtained at the trifling expense of $26.00. The opportunities for others invading the placer boundaries, if within them there was a known vein or lode, would naturally have been the occasion of much uneasiness to the owners of the placer claim, to avoid which we may well suppose they would readily have incurred expense vastly above the government price of the lode claim. Clear and convincing proof would seem, therefore, to be necessary to overcome the presumption thus arising that the applicant for the placer patent did not know at the time of the existence of any such lode."

In

Iron & Silver Mining Co. v. Mike & Starr Gold & Sil. Mining Co., supra,

he court in the course of the opinion said:

"As was said by the Circuit Court in the Eureka case, a patent for a mining claim is iron clad in its potency against all mere speculative inferences."

The placer applicant before he is allowed to make inal proof is required to furnish evidence of the non-existence of known veins within the ground covered by his application. The rule stated in the

Maxwell Land Grant case, 121 U. S. 325,

s applicable therefore to a case where a portion of the and covered by placer patent is claimed on account of he alleged existence of a known vein as well as to a case where the effect of a patent is attempted to be

defeated on account of the alleged existence of prior existing lode locations. The language of the court in that case is as follows:

> "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions and the control of the process by which this evidence of title is issued to the grantee, demands that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided."

In

> Grand Central Min. Co. v. Mammoth Min. Co., 83 Pac., at page 677,

the Supreme Court of Utah stated the rule that strict proof is required to overcome a prior grant, as follows:

> "In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required. In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory that the object of each section of the Revised Statutes, and the whole policy of the entire law, should not be overlooked."

VIII.

A certified copy of the recorded declaratory statement of the location of a mining claim is only evidence of the facts which by law are required to be stated in it.

1 Lindley on Mines, 2nd Ed., Sec. 392.

The provision of the Statutes of the State of Montana relative to the recording of a declaratory statement of location in 1891, are to be found in

Com. Stat. Montana, of 1887, Fifth Div., Sec. 1477 and 1479,

which read as follows:

Sec. 1477. Any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, who shall hereafter discover or locate any placer deposits of gold, or other deposit of minerals, including building stone, limestone, marble, coal, salines and saline springs, clay, sand or other mineral substances having a commercial value, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing, on oath made before some person authorized by law to administer oaths describing such claim in the manner provided by the laws of the United States.

Sec. 1479. That in order to entitle any per-

son or persons to record in the county recorder's office of the proper county, any lead, lode or ledge, there shall first be discovered on said lode, lead or ledge, a vein or crevice of quartz, or ore with at least one well defined wall.

The requirement of the laws of the United States on this point is to be found in Section 2324 of the Revised Statutes, which provides that within twenty days after making such discovery the locator must make and file in the office of the Recorder of the County in which such discovery was made a declaratory statement thereof, which shall contain the names of the locators, the date of location, and such a description of the claim located, by reference to some natural object or permanent monument, as will identify it.

IX.

Sec. 2320 R. S. U. S.

requires that the location must be distinctly marked on the ground so that its boundaries can be readily traced. The description of the marking of such boundaries or any statement that such boundaries were marked on the ground is not required to be stated in the declaratory statement of the location. Independent proof therefore is required of the fact of the marking of such boundaries and of the further fact of the making of a discovery.

X.

From

2nd Edition of Lindley on Mines, Sec. 644,

we quote as follows:

"Abandonment is a question of fact to be determined by the jury. No arbitrary rule can be laid down which will satisfy all cases. The question being one purely of intent, the fact is to be determined by the acts and conduct of the party. It may be expressed or implied; it may be effected by plain declaration of intention to abandon, and it may be inferred from acts or failures to act so inconsistent with an intention to retain it that the unprejudiced mind is convinced of the renunciation."

To the same effect see

27 Cyc. 596;

Migeon v. Montana Central Railway Co., supra;

Harkrader v. Carroll, 75 Fed. 474.

XI.

Testimony cannot be taken after the time allowed by law for the taking of the same has expired. If an application then be made for an order for the allowing of the taking of such testimony it is necessary that a showing of diligence be made.

Equity Rule 69;

Western Electric Co. v. Capitol Telephone Co., 86 Fed. 769;

Lister v. Clark, 9 Fed. 854.

XII.

The quotation already made from the case of

Dahl v. Raunheim, supra,

is to the effect that the issuance of the patent conclusively determines the placer character of the ground. To the same effect is:

Washoe Copper Co. v. Junilla, supra.

XIII.

Since the issuance of placer patent conclusively determines that the ground is placer in character, evidence is, of course, inadmissible to show that the ground is not of such character or that it has never been worked for that purpose.

Washoe Copper Co. v. Junilla, supra.

XIV.

From the very nature of the case there can be no presumption of the continuance of a vein beyond the point where it is actually known to exist. Veins, of course, do not continue indefinitely. If not cut off by faults, they otherwise come to an end, or as miners say, "pinch out." Dislocation of veins by faults is of frequent occurrence and without underground development no one can say where such fault will be discovered. From the very nature of the case there can, therefore, be no presumption of

the continuance of a vein beyond the place where it is actually exposed or if it continues there can be no presumption that it will continue on the same strike.

From

Iron Silver Mining Co. v. Mike & Starr Gold & Sil. Co., supra,

we quote as follows:

> "It is a matter well known to persons at all familiar with mining for the precious metals that veins rich in gold and silver are generally found with barren rock within a few feet on each side of them, and that such veins more frequently than otherwise come abruptly to an end. No one thus familiar would feel justified in concluding from the mere distance or vicinity of other mines that they had any necessary connection with each other. In accordance with this doctrine this court held Dahl v. Rauheim, 132 U. S. 260, 263 (33; 324, 325), that the discovery by the defendant in that case of a lode two or three hundred feet outside of the boundaries of the placer claim in suit did not create any presumption of the possession of a vein or lode within those boundaries, nor, we may add that a vein or lode existed within them."

Appellee respectfully submits that the decree appealed from should be affirmed.

Respectfully submitted,

JOHN A. SHELTON,

Solicitor for Appellee.

"The decree in this case is erroneous, and is hereby ordered set aside and vacated.

"I still think, however, that the defendants must prevail generally, but the extent to which their rights should be upheld must be limited. Under Sec. 2333 R. S. U. S. they can only take a decree for the lode referred to in the memorandum opinion as having a southeast, northwest strike and a southerly dip, and which was well known to exist prior to Oct. 21, 1881; and for twenty-five feet of surface on east side thereof.

"But to define the lode with satisfactory precision is, I think, impossible under the evidence; and as the surface to belong to the defendants can only be described after the lode is defined, it becomes equally impossible to define the surface area with accuracy.

"The burden of proving the right to the lode having been put upon defendants as lode claimants, it is still upon them to prove the size or extent and strike of their lode with a definiteness sufficient to enable the court to describe the lode in order to define the surface, for it is only the lode, and 25 feet of surface on each side of the lode that they are entitled to."

OFFICE OF THE CLERK OF THE DISTRICT COURT, OF THE UNITED STATES, IN AND FOR THE DISTRICT OF MONTANA.

UNITED STATES OF AMERICA,
STATE OF MONTANA,
COUNTY OF SILVER BOW,—ss.

I, George W. Sproule, Clerk of the United States District Court, for the district of Montana, do hereby certify that the above and foregoing, consisting of one page, is a full, true and correct copy of a portion of the opinion on rehearing filed in the office of the Clerk of the United States Circuit Court, in and for the District of Montana, in the case entitled South Butte Mining Co., a corporation, complainant, vs. Butte & Veronica Copper Mining Co. and Michael J. O'Farrell, defendants, numbered 324, in the files of said court, which said files are now in my care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said court at Butte, Montana, this 3rd day of February, 1914.

GEO. W. SPROULE,
Clerk.
By HARRY H. WALKER,
Deputy Clerk.

(SEAL)